

CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER 2020 TERM

ROMELL BROOM,

Petitioner,

vs.

TIM SHOOP, Warden,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals for the Sixth Circuit

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

(CAPITAL CASE: EXECUTION DATE IS SCHEDULED MARCH 16, 2022)

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RECOMMENDED FOR PUBLICATION
Pursuant to Sixth Circuit I.O.P. 32.1(b)

File Name: 20a0188p.06

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

ROMELL BROOM,

Petitioner-Appellant,

v.

TIM SHOOP, Warden,

Respondent-Appellee.

No. 19-3356

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 1:10-cv-02058—Christopher A. Boyko, District Judge.

Argued: April 7, 2020

Decided and Filed: June 23, 2020

Before: BATCHELDER, MOORE, and GIBBONS, Circuit Judges.

COUNSEL

ARGUED: Timothy F. Sweeney, LAW OFFICE OF TIMOTHY FARRELL SWEENEY, Cleveland, Ohio, for Appellant. Charles L. Wille, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee. **ON BRIEF:** Timothy F. Sweeney, LAW OFFICE OF TIMOTHY FARRELL SWEENEY, Cleveland, Ohio, S. Adele Shank, LAW OFFICE OF S. ADELE SHANK, Columbus, Ohio, for Appellant. Charles L. Wille, OFFICE OF THE OHIO ATTORNEY GENERAL, Columbus, Ohio, for Appellee.

OPINION

KAREN NELSON MOORE, Circuit Judge. In an infamous September 2009 incident, the state of Ohio tried to execute death-row inmate Rommel Broom, and failed. More

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specifically, the state tried to execute Broom by way of lethal injection, but was forced to abandon the effort when the execution team concluded—two hours into the process—that it could not maintain a viable IV connection to Broom’s veins. The state then returned Broom to his cell, to await a second execution attempt on another day. That second execution attempt has not yet happened, however, because the parties have spent the last eleven years litigating whether the U.S. Constitution bars Ohio from *ever* trying to execute Broom again—Broom relies on both the Eighth Amendment’s prohibition on “cruel and unusual” punishment and the Fifth Amendment’s prohibition on “double jeopardy.” The state courts, including the Ohio Supreme Court, have rejected Broom’s contentions on the merits, as did the district court below on habeas review. Broom’s case now comes before us.

We in no way condone Ohio’s treatment of Broom; that it took *two hours* of stabbing and prodding for the state to realize that it could not maintain a viable IV connection to Broom’s veins is disturbing, to say the least. But because the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”) permits us to reverse state court merits decisions in only a narrow set of circumstances, and because the Ohio Supreme Court’s decision rejecting Broom’s constitutional claims on the merits does not fall within that set of circumstances here, we **AFFIRM** the district court’s judgment denying Broom habeas relief.

I. BACKGROUND

Ohio’s lethal injection protocol has been the subject of federal litigation for over a decade. *See generally In re Ohio Execution Protocol (Fears)*, 860 F.3d 881 (6th Cir. 2017) (en banc); *Cooley v. Strickland (Biros)*, 589 F.3d 210 (6th Cir. 2009); *In re Ohio Execution Protocol Litig. (Hartman)*, 906 F. Supp. 2d 759 (S.D. Ohio 2012). Most of this litigation has consisted of death-row inmates bringing lawsuits pursuant to 42 U.S.C. § 1983, alleging that Ohio’s protocol is unconstitutional because it risks causing them unnecessarily severe pain during the final minutes of their lives and because more humane alternatives to Ohio’s protocol exist. *See* U.S. Const., amend. VIII (prohibiting the “inflict[ion]” of “cruel and unusual punishment[.]”); *Glossip v. Gross*, 135 S. Ct. 2726 (2015) (setting forth relevant legal standard); *Baze v. Rees*, 553 U.S. 35 (2008). Although Ohio has repeatedly modified its protocol in response to this litigation—such as by changing the drugs used in its lethal injection “cocktail” and by increasing oversight of its

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execution team—the courts have by and large affirmed the constitutionality of Ohio’s system at every turn (over the dissent of some members of this court, *see, e.g., In re Ohio Execution Protocol (Fears)*, 860 F.3d at 892–909 (Moore, J., dissenting)).

Romell Broom’s case is different. Unlike the typical death-row inmate, Broom is not challenging the state’s lethal injection protocol writ large (at least in this proceeding). Rather, Broom makes the novel argument that his forthcoming execution is unconstitutional because Ohio has already tried—and failed—to execute him once before. The facts of that failed execution are described by the Ohio Supreme Court as follows:

Broom was transported to the Southern Ohio Correctional Facility (“Lucasville”) on September 14, 2009, in anticipation of his execution scheduled for the next day. Upon his arrival at Lucasville, a nurse and a phlebotomist conducted a vein assessment and found that Broom’s right-arm vein appeared accessible, but his left-arm vein seemed less so. Prison officials communicated this information to Edwin C. Voorhies Jr., the regional director for the Office of Prisons of the Ohio Department of Rehabilitation and Correction (“ODRC”), and the medical team assured him that this would not present a problem.

At 1:59 p.m. on September 15, the warden finished reading the death warrant to Broom. One minute later, Team Members 9 (a female) and 21 (a male) entered the holding cell to prepare the catheter sites.

Team Member 9 made three attempts to insert a catheter into Broom’s left arm but was unable to access a vein. At the same time, Team Member 21 made three unsuccessful stabs into Broom’s right arm. After a short break, Member 9 made two more insertions, the second of which caused Broom to scream aloud from the pain.

Member 21 managed to insert the IV catheter into a vein, but then he lost the vein and blood began running down Broom’s arm. When that occurred, Member 9 rushed out of the room, saying “no” when a security officer asked if she was okay.

Director Voorhies testified that he could tell there was a problem in the first 10 to 15 minutes. Warden Phillip Kerns saw the team make six or seven attempts on Broom’s veins during the same 10–to–15–minute period. According to Kerns, the team members did hit veins, but as soon as they started the saline drip, the vein would bulge, making it unusable.

About 15 minutes into the process, Kerns and Voorhies saw Member 9 leave the holding cell. Voorhies described her as sweating “profusely” and heard her say

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that she and Member 21 had both accessed veins, but the veins “blew.” Member 17 then entered the holding cell and made “several attempts” to access a vein in Broom's left arm. Simultaneously, Member 21 continued his attempts on Broom's right arm.

Terry Collins, who was then the director of the ODRC, called a break about 45 minutes into the process to consult with the medical team. The break lasted 20 to 25 minutes. The medical team reported that they were gaining IV access but could not sustain it when they tried to run saline through the line. They expressed “clear concern” about whether they would get usable veins. But because they said that there was a reasonable chance of establishing venous access, the decision was made to continue.

By this time, Broom was in a great deal of pain from the puncture wounds, which made it difficult for him to move or stretch his arms. The second session commenced with three medical team members—9, 17, and 21—examining Broom's arms and hands for possible injection sites. For the first time, they also began examining areas around and above his elbow as well as his legs. They also reused previous insertion sites, and as they continued inserting catheter needles into already swollen and bruised sites, Broom covered his eyes and began to cry from the pain. Director Voorhies remarked that he had never before seen an inmate cry during the process of venous access.

After another ten minutes or so, Warden Kerns asked a nurse to contact the Lucasville physician to see if she would assess Broom's veins and offer advice about finding a suitable vein. Broom later stated that he saw “an Asian woman,” whom he erroneously identified as “the head nurse,” enter the chamber. Someone handed her a needle, and when she inserted it, she struck bone, and Broom screamed from the pain. At the same time, another team member was attempting to access a vein in Broom's right ankle.

The Lucasville physician confirmed that she came to Broom's cell, examined his foot, and made one unsuccessful attempt to insert a needle but quickly concluded that the effort would not work. By doing so, she disobeyed the warden's express instructions to observe only and not get involved. The physician examined Broom's foot but could see no other vein.

After the physician departed, the medical team continued trying to establish an IV line for another five to ten minutes. In all, the second session lasted approximately 35 to 40 minutes.

During the second break, the medical team advised that even if they successfully accessed a vein, they were not confident that the site would remain viable throughout the execution process. The governor's office had signaled its willingness to grant a reprieve, and so the decision was made to halt the execution for the day.

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Dr. Jonathan Groner examined and photographed Broom three or four days afterward. The photographs show 18 injection sites: one on each bicep, four on his left antecubital (forearm), three on his right antecubital, three on his left wrist, one on the back of his left hand, three on the back of his right hand, and one on each ankle. Prison officials later confirmed that he was stuck at least 18 times.

Dr. Mark Heath met with Broom one week after the event. Dr. Heath observed “considerable bruising” and a lot of “deep and superficial” tissue damage consistent with multiple probing. Dr. Heath also posited that the actual number of catheter insertions was much higher than the number of needle marks, because according to what Broom told him, the medical team would withdraw the catheter partway and then reinsert it at a different angle, a procedure known as “fishing.”

State v. Broom, 51 N.E.3d 620, 623–25 (Ohio 2016).

Shortly after this failed execution attempt Broom filed a Section 1983 lawsuit in federal court, claiming that any attempt to execute him again would violate either the Eighth Amendment’s prohibition on cruel and unusual punishments or the Fifth Amendment’s bar on “double jeopardy.” *See* U.S. Const., amend. V (“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]”). The district court dismissed most of Broom’s suit without prejudice, reasoning that, because Broom sought to prevent Ohio from executing him *at all* (as opposed to from executing him in a certain *manner*), his claims were best classified as a habeas challenge to “the fact[] of [his] sentence itself.” *Broom v. Strickland*, 2010 WL 3447741, at *3–4 (S.D. Ohio Aug. 27, 2010); *see also In re Campbell*, 874 F.3d 454, 462 (6th Cir. 2017) (holding that a “death-penalty challenge is . . . cognizable in habeas” only if it alleges “a defect [that] impairs the very fact of the death sentence itself”). Consequently, Broom filed a placeholder habeas suit in federal court, *see Broom v. Bobby*, 2010 WL 4806820 (N.D. Ohio Nov. 18, 2010), and then proceeded to litigate his “no second execution” Eighth Amendment and Fifth Amendment claims in Ohio state court, *see* 28 U.S.C. § 2254(b)(1)(A) (requiring state prisoners to exhaust state-court remedies before bringing a federal habeas claim).

In the state trial court, Broom argued that Ohio’s conduct during the failed execution attempt was reckless at best, malicious at worst. And as evidence of this contention, Broom pointed both to eyewitness testimony recounting the state’s prolonged and painful effort to execute him (which we set forth above), and to expert testimony stating, among other things, that the execution team failed to abide by its own protocols and that Broom’s veins “should have

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been easily accessed.” *Cooey v. Strickland (Biros)*, 2009 WL 4842393, at *70 (S.D. Ohio Dec. 7, 2009), *aff’d*, 589 F.3d 210 (6th Cir. 2009).¹ Therefore, Broom reasoned, his first execution attempt was analogous to purposeful torture, and it would be cruel and unusual to allow the state to subject him to its lethal injection protocol again. The state trial court, however, rejected Broom’s arguments, and denied Broom’s request for an additional evidentiary hearing. Although the trial court acknowledged “that repeated needle sticks are indeed unpleasant,” it concluded ultimately that such “needle sticks” “are not torture when performed to establish IV lines and the procedure is not such that a substantial risk of serious harm is present, especially where, as here, the procedure [was] halted out of an abundance of caution prior to the administration of any substance (including saline).” R. 19-3 (Tr. Court Order) (Page ID #1319). The Ohio Court of Appeals affirmed. *See State v. Broom*, 2012 WL 504504 (Ohio Ct. App. Feb. 16, 2012).

Broom’s case then went to the Ohio Supreme Court. In a 4–3 decision, the court held that neither the Eighth Amendment nor the Fifth Amendment barred a second execution attempt. As for Broom’s Eighth Amendment claim, the majority first analyzed the Supreme Court decision *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947)—in which the Supreme Court upheld the constitutionality of a second execution attempt, in the context of a failed electrocution—and then concluded that, “[b]ased on *Resweber*,” a second execution attempt would not violate the Eighth Amendment here because Ohio’s “intention in carrying out the execution is not to cause unnecessary physical pain or psychological harm, and the pain and emotional trauma Broom already experienced do not equate with the type of torture prohibited by the Eighth Amendment.” *Broom*, 51 N.E.3d at 631. The majority also held that, because

¹This testimony came from a hearing U.S. District Judge Gregory Frost conducted on the constitutionality of Ohio’s lethal injection protocol in December 2009. Although Broom was not a direct participant in this hearing, his failed execution was the primary subject at hand. This was because other death-row inmates seized on Ohio’s inept treatment of Broom to argue that Ohio’s protocol subjected them (the inmates with pending executions) to an unconstitutionally high risk of pain. As a result, those inmates’ lawyers spent a substantial amount of time gathering information about Broom’s execution, including soliciting testimony from medical experts. Although this constitutional argument ultimately proved unavailing, *see, e.g., Cooey*, 589 F.3d at 228 (allowing a post-Broom execution to proceed, despite the “unfortunate” Broom “incident,” because, although Ohio’s protocol “is regrettably open to the possibility of mistaken application,” “[w]hen administered properly,” it is “humane and constitutional”), the evidence collected at this December 2009 hearing still constitutes the best and most thorough accounting of Broom’s first attempted execution.

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Ohio had revamped its lethal injection protocol since Broom's failed execution and because the state had conducted over 20 executions under those revamped protocols (with the federal courts' approval), Broom had not established that the state was likely to repeat its past errors. *Id.* at 631–32 (citing Ohio's public execution database and *In re Ohio Execution Protocol Litig. (Wiles)*, 868 F. Supp. 2d 625, 629–32 (S.D. Ohio 2012)). As for Broom's Fifth Amendment claim, the majority reasoned that, because the state's first execution attempt "did not proceed to the point of injection of a lethal drug into the IV line, jeopardy never attached," and, as a result, a second execution attempt did not implicate "the Fifth Amendment protection against double jeopardy." *Id.* at 627.

Three justices dissented. In the principal dissent, Justices French and Pfeifer argued that, because there was "an unresolved dispute of fact at the heart of the case, namely, the reason for the state's inability to establish IV access at the start of Broom's attempted execution," Ohio law entitled Broom to at least an evidentiary hearing. *Id.* at 634 (French, J., dissenting). "If the state cannot explain why the Broom execution went wrong," the dissent reasoned, "then the state cannot guarantee that the outcome will be different next time." *Id.* at 637. The justices did not, however, take a position on the merits of either of Broom's constitutional claims.

Justice O'Neill also dissented. And, in his dissent, he contended that a second execution attempt would violate the Eighth Amendment—full stop—in large part because, in his view, standards of decency have "evolved substantially" since the Supreme Court's decision in *Resweber*. *See id.* at 639–40 (O'Neill, J., dissenting) (describing the state's initial execution attempt as "torture"). Justice O'Neill did not address Broom's Fifth Amendment claim.

His state remedies exhausted, Broom resumed litigating his (still-pending) habeas petition in federal court. After first rejecting Broom's request for permission to conduct additional discovery—a decision that is not on appeal here—the district court determined, in a thoughtful and thorough 71-page order, that Broom's Eighth Amendment and Fifth Amendment claims could not proceed. Guided by the demanding standards imposed on federal habeas review by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), the district court reasoned that, although "[f]ew would disagree that Ohio's failed attempt to execute Broom was a deeply unfortunate incident," given the exceedingly limited on-point Supreme Court

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precedent, “Broom ha[d] not demonstrated that the [Ohio Supreme Court] was objectively unreasonable in deciding that the pain and trauma he endured as a result of the State’s initial execution attempt and the psychological pain he may experience in a second attempt do not rise to the level of an Eighth Amendment violation.” *Broom v. Jenkins*, 2019 WL 1299846, at *31 (N.D. Ohio Mar. 21, 2019); *see also id.* at *34 (similar conclusion with respect to Broom’s Fifth Amendment claim).

This appeal followed.

II. DISCUSSION

When a habeas petitioner raises a claim that has already been adjudicated on the merits by a state court, AEDPA requires federal courts to defer to the state court’s decision unless the court’s decision “was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.” 28 U.S.C. § 2254(d)(1). AEDPA deference is a “difficult” bar to overcome, requiring the petitioner to “show that the state court’s ruling on [his] claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011). Deference to the state court is particularly warranted, moreover, when the governing Supreme Court precedent is itself unclear or ambiguous. *See, e.g., Wright v. Van Patten*, 552 U.S. 120, 126 (2008) (per curiam) (“Because our cases give no clear answer to the question presented, let alone one in [the petitioner’s] favor, it cannot be said that the state court unreasonably applied clearly established Federal law.” (citations omitted)); *Mitchell v. Esparza*, 540 U.S. 12, 17 (2003) (per curiam) (“A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous.”).

A.

At the outset, the parties dispute a threshold matter. Was the Ohio Supreme Court’s ruling “on the merits,” such that it is entitled to deference under § 2254(d)(1)? We think it was.

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Harrington v. Richter teaches that, “[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be *presumed* that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.” 562 U.S. at 99 (emphasis added). This is a “strong” presumption “that may be rebutted only in unusual circumstances,” such as when a state court rejects a federal claim because “of sheer inadvertence,” without “evaluat[ing] . . . the intrinsic right and wrong of the matter.” *Johnson v. Williams*, 568 U.S. 289, 302–03 (2013).

Regardless of what one thinks of the Ohio Supreme Court’s decision, there is no doubt that the court in fact adjudicated Broom’s Eighth Amendment and Fifth Amendment claims on the merits, by “evaluat[ing] . . . the intrinsic right and wrong of the matter[s].” *Id.* And although Broom points out, correctly, that the court leaned on extra-record evidence at one point in its decision, *see Broom*, 51 N.E.3d at 632 (citing Ohio’s online public execution database as proof that “[t]he state has executed 21 death-row inmates since the attempted execution of Broom”), there is no reason to think that this citation rendered the court’s decision “non-merits” for purposes of AEDPA review. This is especially so because the extra-record citation was to a governmental website. *See, e.g., United States v. Garcia*, 855 F.3d 615, 621 (4th Cir. 2017) (“This court and numerous others routinely take judicial notice of information contained on state and federal government websites.”). Similarly, there is no reason to think that the court’s decision became “non-merits” simply because new factual developments occurred after the court issued its decision in March 2016. *See* Appellant Reply Br. at 11 (arguing, without citation to precedent, that the Ohio Supreme Court’s decision was not “on the merits” because, in October 2016, Ohio changed the drugs used in its lethal injection protocol). And there is likewise no force to Broom’s contention that “judgment on a materially incomplete record is not an adjudication [on the merits],” Appellant Br. at 40 (quoting *Winston v. Kelly*, 592 F.3d 535, 555 (4th Cir. 2010)), because this court has twice rejected the strain of case law cited by Broom, describing it as incompatible with the Supreme Court’s decisions in *Harrington* and *Cullen v. Pinholster*, 563 U.S. 170 (2011). *See Loza v. Mitchell*, 766 F.3d 466, 494–95 (6th Cir. 2014); *Ballinger v. Prelesnik*, 709 F.3d 558, 561–62 (6th Cir. 2013).

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B.

With this threshold question resolved, we now turn to the parties' chief dispute: whether the Ohio Supreme Court unreasonably applied "clearly established" Supreme Court precedent when it ruled that Ohio could attempt to execute Broom a second time without running afoul of the Eighth Amendment's bar on "cruel and unusual" punishments.

For starters, we first clarify what the clearly established Supreme Court precedent governing Broom's claim is, exactly. Ohio argues that *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), is the only such precedent, because it is the only Supreme Court precedent dealing with a factual scenario even remotely analogous to the one presented here, *i.e.*, the constitutionality of a second execution attempt. Broom, by contrast, argues that a later Supreme Court decision, *Trop v. Dulles*, 356 U.S. 86 (1958), is the most on-point precedent because, although *Trop*'s facts are nothing like the facts here—*Trop* concerned the constitutionality of using denationalization as a punishment—that decision established the important principle that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society," *id.* at 101 (plurality opinion).

Ohio is right. For a Supreme Court precedent to be "clearly established" the decision's holdings must "squarely address[] the issue in [the] case," *Wright*, 552 U.S. at 125; "abstract" constitutional principles, or dicta more broadly, do not suffice, *see Lopez v. Smith*, 574 U.S. 1, 6 (2014) (per curiam) (reversing circuit court for holding that certain Supreme Court decisions provided "clearly established" law when the cited decisions did not "address[], even remotely, the *specific* question presented by [the] case" (emphasis added)); *White v. Woodall*, 572 U.S. 415, 419 (2014) (noting that "clearly established Federal law . . . includes only the holdings, as opposed to the dicta, of this Court's decisions" (citations omitted)). Because *Resweber* is the only Supreme Court precedent to address the issue presented by this case—the constitutionality of a second execution attempt after a botched first attempt—it was the only Supreme Court precedent capable of providing a clear Eighth Amendment holding for the Ohio Supreme Court to follow. And although Broom suggests that *Trop*, and its progeny, have implicitly overruled *Resweber*, *see* Appellant Br. at 47 (describing the *Resweber* court's "understanding of the impact of trauma" as "no longer valid"), not only does this argument actually undermine Broom's

point—if *Resweber* is no longer good law that just means there is no clearly established law in this realm *at all*—but also the Supreme Court’s continued citation of *Resweber* shows that the Court still views the decision as binding. *See, e.g., Glossip*, 135 S. Ct. at 2732, 2739; *Baze*, 553 U.S. at 50.

With this issue clarified, our inquiry becomes twofold: First, what did *Resweber* hold, as a matter of Eighth Amendment law? And, second, did the Ohio Supreme Court unreasonably apply that holding when it denied Broom’s Eighth Amendment claim?

1.

Resweber’s facts are straightforward. In 1945, a Louisiana jury convicted a young African-American man named Willie Francis of murder and sentenced him to death.² Consequently, on May 3, 1946, the state’s execution team read Francis his last rites and strapped him into the electric chair. Similar to the case at hand, however, when “[t]he executioner threw the switch . . . death did not result”; this was “presumably because of some mechanical difficulty.” *Resweber*, 329 U.S. at 460. Francis was then “removed from the chair and returned to prison.” *Id.* The question thus became whether the Constitution permitted Louisiana to attempt to execute Francis by electric chair again, despite the fact that the state had not only put Francis “through the difficult preparation for execution,” to no avail, but had also sent “through [Francis’s] body a current of electricity intended to cause death,” also to no avail. *Id.* at 461.

The Court said yes, the Constitution did not prohibit Louisiana from attempting to execute Francis a second time. Its opinion, however, was a fractured one.

The plurality opinion. Justice Reed—writing for himself, Chief Justice Vinson, Justice Black, and Justice Jackson—ruled that a second execution attempt would not violate the Eighth Amendment’s bar on “cruel and unusual” punishments because neither the “psychological strain” endured by Francis nor “the fact that [Francis] ha[d] already been subjected to a current

²As Justice O’Neill explained in dissent, Francis’s murder conviction and resulting death sentence were the product of a deeply racist and unfair criminal justice system. *See Broom*, 51 N.E.3d at 640 (O’Neill, J., dissenting) (citing Miller & Bowman, *Death by Installments: The Ordeal of Willie Francis* (1988)). Because this aspect of Francis’s story is not relevant for present purposes, however, we do not emphasize it here.

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of electricity” rendered “his subsequent execution any more cruel in the constitutional sense than any other execution.” *Id.* at 464. “The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely,” the Court added. *Id.* The Court then emphasized that this conclusion held especially true in Francis’s circumstance because “[t]here [was] no purpose to inflict unnecessary pain [during the failed execution] nor any unnecessary pain involved in the proposed [second] execution.” *Id.*; see also *In re Kemmler*, 136 U.S. 436 (1890) (upholding the constitutionality of the electric chair, as a general matter). In other words, the Court reasoned, Francis was just the “unfortunate victim” of an “accident,” akin to a prisoner injured by a “fire in the cell block.” *Resweber*, 329 U.S. at 464.

The Frankfurter opinion. Justice Frankfurter took a different approach. In his view, the Eighth Amendment did not apply to the states at all, only the Fourteenth Amendment did.³ And because the Fourteenth Amendment demanded only that the state not “offend[] a principle of justice rooted in the traditions and conscience of our people,” and because the state’s initial failure to execute Francis was simply “an innocent misadventure” (and hence not in violation of any deeply-rooted “principle of justice”), the Constitution permitted Louisiana to attempt to execute Francis a second time. *Id.* at 470 (citation omitted). Still, Justice Frankfurter cautioned, “a series of abortive attempts at electrocution or even a single, cruelly willful attempt,” may “raise different questions,” even under the more state-friendly Fourteenth Amendment standard. *Id.* at 471.

The dissent. Justice Burton—writing for himself, Justice Douglas, Justice Murphy, and Justice Rutledge—dissented. Like Justice French’s principal dissent here, see *supra* at 7, the *Resweber* dissenters did not argue that a second execution attempt would necessarily violate the Eighth Amendment. Rather, the dissenters reasoned, the case needed to be remanded so that a state trial court could discern “the extent, if any, to which electric current was applied to [Francis] during his attempted electrocution.” *Id.* at 472. But, the dissenters went on, if “a

³The Supreme Court has since rejected this view, and has “incorporated” the Bill of Rights, or most of them anyway, so that they apply to the states. See, e.g., *Robinson v. California*, 370 U.S. 660 (1962) (confirming that state governments must comply with the Eighth Amendment).

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current of electricity *was* caused to pass through [Francis’s] body,” intentionally subjecting Francis to that pain again would be cruel and unusual, if not “torture,” and would “present[] more tha[n] a case of mental anguish.” *Id.* at 476–77 (emphasis added). “The contrast,” the dissenters observed, “is that between instantaneous death and death by installments—caused by electric shocks administered after one or more intervening periods of complete consciousness of the victim.” *Id.* at 474.

2.

With this context, and AEDPA’s demanding standard of review, in mind, we now ask whether the Ohio Supreme Court reasonably applied *Resweber* when it rejected Broom’s Eighth Amendment claim. We conclude that it did. Although Broom makes a compelling case on the merits, one that some members of the panel might be tempted to accept were this case before us on direct review, *cf. Sireci v. Florida*, 137 S. Ct. 470, 471 (2016) (Breyer, J., dissenting from denial of certiorari) (stating that he “would have heard Broom’s claim” on direct review from the Ohio Supreme Court, to determine if a “second [execution] attempt amount[ed] to a ‘cruel and unusual’ punishment”), Broom cannot show that the Ohio Supreme Court’s decision “was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement,” *Harrington*, 562 U.S. at 103. For better or for worse, five justices in *Resweber* agreed that the Constitution does not prohibit a state from executing a prisoner after having already tried—and failed—to execute that prisoner once, so long as the state (1) did not intentionally, or maliciously, inflict unnecessary pain during the first, failed execution, and (2) will not inflict unnecessary pain during the second execution, beyond that inherent in the method of execution itself. And, for better or for worse, that essentially is what the Ohio Supreme Court held here. Specifically, the court held that (1) “[t]he state’s intention in carrying out the execution [was] not to cause unnecessary physical pain or psychological harm,” and (2) Broom is unlikely to suffer severe pain during his second execution—or to endure yet another failed execution—because the state has since amended its execution protocols (with the federal courts’ approval), and has executed numerous prisoners under those revamped protocols. *Broom*, 51 N.E.3d at 631–32. And thus, the court concluded, the Eighth Amendment did not prohibit Ohio from attempting to execute Broom a second time.

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Whatever one may think of that conclusion, it was not an “unreasonable” application of Supreme Court precedent. If anything, it was a direct application of Supreme Court precedent (albeit of a precedent that may have since outlived its usefulness).

Broom’s two principal counterarguments do not persuade us otherwise.

First, Broom at times emphasizes the views of the *Resweber* dissent, as if to argue that *that* opinion, not the plurality, would constitute the “clearly established” law today, were the Supreme Court to review the issue afresh. *See, e.g.*, Appellant Br. at 57. On one level this argument makes sense. Justice Frankfurter’s fifth vote hinged on an outdated understanding of constitutional procedure, *see supra* at n.3, and Justice Frankfurter himself suggested that, but-for that understanding, he might have voted with the dissenters, *see, e.g., Resweber*, 329 U.S. at 471 (Frankfurter, J., concurring) (“Strongly drawn as I am to some of the sentiments expressed by my brother Burton . . .”). But not only does this argument make *Resweber* even more ambiguous than it already is, which does not help Broom’s case on AEDPA review, *see Mitchell*, 540 U.S. at 17, but also it is far from clear that Broom would prevail even under the *Resweber* dissenters’ understanding of the Eighth Amendment.

Recall the key fact emphasized by the *Resweber* dissenters: Louisiana had (allegedly, at least) caused a “current of electricity . . . to pass through the body of [Francis]” during its first attempt at electrocution. *Resweber*, 329 U.S. at 477 (Burton, J., dissenting). Consequently, the dissenters reasoned, a second execution attempt would not only cause Francis needless “mental anguish,” but it would *physically* be akin to “death by installments [of electricity],” or, more bluntly, “torture.” *Id.* at 474, 476–77. Here, by contrast, however inept Ohio’s treatment of Broom was during the first execution attempt, at no point during the two-hour ordeal did the state actually inject Broom with any part of its three-drug cocktail. As a result, Ohio is not requesting that it be allowed “two injections per prisoner,” the way Louisiana was requesting “two electrocutions per prisoner” with Francis. This distinction may seem trite, but it is the distinction that the *Resweber* dissenters found dispositive, and it would not help Broom here.

Second, Broom attacks the reasonableness of the Ohio Supreme Court’s conclusion that he is unlikely to face severe pain—or another botched execution—the next time Ohio attempts to

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execute him, citing changes to Ohio's lethal injection protocol that occurred in October 2016, after the Ohio Supreme Court's decision. *See* Appellant Br. at 41–42; Appellant Reply Br. at 6–11. Indeed, Broom points out, on November 15, 2017, Ohio tried to execute another inmate, Alva Campbell, under the new, October 2016 protocol, only to give up after “four unsuccessful attempts at IV access.” Appellant Br. at 42.⁴

That the Ohio Supreme Court did not have the opportunity to consider these new developments is notable, to be sure. But that fact alone cannot justify habeas relief. For one, this kind of “challenge to the protocol” argument is indistinguishable from the “method of execution” arguments this court reserves for section 1983 suits, *see supra* at 5, and so it is unclear the extent to which this argument is even cognizable on habeas review. After all, the question Broom asked us to answer is whether the Eighth Amendment prohibits Ohio from making an “additional attempt” to execute him *at all*, not whether Ohio's post-October 2016 protocols risk causing an unconstitutional amount of pain, as a general matter. App. R. 16 (COA Order at 3).⁵ But even leaving that procedural concern aside, we are hard pressed to conclude that the Ohio Supreme Court's failure to consider the effect of the October 2016 protocol on Broom's future execution renders its decision “unreasonable,” and therefore worthy of reversal, when this court has (for better or for worse) since affirmed the constitutionality of that *exact* protocol, on three different occasions, including after the botched Alva Campbell execution. *See In re Ohio Execution Protocol Litig. (Henness)*, 946 F.3d 287 (6th Cir. 2019); *In re Ohio Execution Protocol Litig. (Campbell & Tibbetts)*, 881 F.3d 447 (6th Cir. 2018); *In re Ohio Execution Protocol (Fears)*, 860 F.3d 881 (6th Cir. 2017) (en banc); *see also Glossip*, 135 S. Ct. at 2731 (approving virtually identical procedure from Oklahoma). That is to say, there is no reason to think that, had the Ohio Supreme Court had access to all the information Broom wishes it had access to, it would have come out the other way (much less that clearly established Supreme Court precedent *required* it to come out the other way).

⁴As Broom notes, Campbell subsequently died of natural causes, before Ohio could again attempt to execute him. *See* Appellant Br. at 42 n.8.

⁵Indeed, it appears that Broom is still intent on bringing a section 1983 “method of execution” lawsuit after the conclusion of this habeas appeal, *see In re Ohio Execution Protocol Litig. (Broom)*, 2020 WL 401130 (S.D. Ohio Jan. 24, 2020), in which he will presumably challenge the extent to which Ohio's current protocol risks subjecting him to an unreasonably severe amount of pain during the injection process.

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All of that said, we emphasize that we do not address the merits of any future “method of execution” challenge Broom may bring. *See supra* n.5. Nor do we suggest that we would reach this same conclusion were Ohio to try and fail to execute Broom again. Rather, we hold simply that the Ohio Supreme Court did not unreasonably apply clearly established Supreme Court precedent when it rejected Broom’s “no second execution” Eighth Amendment claim in this instance.

C.

This leaves Broom’s Fifth Amendment claim. The Double Jeopardy Clause of the Fifth Amendment states that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.” And in this context the phrase “to be . . . put in jeopardy of life or limb” refers to “[t]he risk of conviction and punishment that a criminal defendant faces at trial.” Black’s Law Dictionary (11th ed. 2019) (defining “jeopardy”). In most circumstances, the Clause stands for the proposition that, if a state puts a defendant on trial for a crime (and jeopardy *attaches*), and the defendant is then acquitted and released (and jeopardy *terminates*), the government may not try that defendant a second time for the same offense (because that would subject the defendant to *double jeopardy*). *See, e.g., Sattazahn v. Pennsylvania*, 537 U.S. 101, 106 (2003); *Richardson v. United States*, 468 U.S. 317, 325 (1984); *see also Currier v. Virginia*, 138 S. Ct. 2144, 2149 (2018) (stating that the Clause exists to prevent prosecutors from “treat[ing] trials as dress rehearsals until they secure the convictions they seek”).

The Supreme Court has long held, however, that the Clause *also* protects criminal defendants “against multiple *punishments* for the same offense.” *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969) (emphasis added) (citing, among other cases, *Ex parte Lange*, 85 U.S. 163, 168 (1873)). Although this additional protection is enigmatic, and the source of some controversy, *see, e.g., Dep’t of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 798–805 (1994) (Scalia, J., dissenting) (arguing that the Clause prohibits only successive *prosecutions*, not successive punishments), in more recent times the Court has clarified that this facet of double jeopardy serves a “limited” purpose: to “ensure that sentencing courts do not exceed, by the device of multiple punishments, the limits prescribed by the legislative branch of government, in which lies the substantive power to define crimes and prescribe punishments.” *Jones v. Thomas*,

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491 U.S. 376, 381 (1989); *see, e.g., Ex Parte Lange*, 85 U.S. at 175–76 (holding that the sentencing court violated the Double Jeopardy Clause when it punished a criminal defendant with imprisonment *and* a fine when the criminal statute explicitly stated that such a defendant could be punished only with imprisonment *or* a fine). In other words, “if a legislature permits multiple punishments, a court can impose such punishments; if a legislature prohibits multiple punishments, a court cannot impose such punishments.” *Palmer v. Haviland*, 273 F. App’x 480, 484 (6th Cir. 2008).

The Supreme Court has never applied the Double Jeopardy Clause in the particular context of a second execution. Although Willie Francis raised a double jeopardy concern in *Resweber*, the Court declined to apply the Fifth Amendment Double Jeopardy Clause because, under a then-prevailing precedent, *Palko v. Connecticut*, 302 U.S. 319 (1937), the Double Jeopardy Clause did not even apply to the states. *See Resweber*, 329 U.S. at 462–63. Instead, the Court’s plurality opinion stated that under *Palko* and the Fourteenth Amendment, there was “no double jeopardy [in *Resweber*] which can be said to amount to a denial of federal due process.” *Id.* at 463. Although *Palko* has since been overruled, *see Benton v. Maryland*, 395 U.S. 784, 793–94 (1969), the Supreme Court has not had occasion to address the question since. A logical application of the more general Double Jeopardy Clause precedent described above, however, suggests that the Clause does not prohibit a second attempt at execution. This is because, when a capital-punishment state attempts to execute a death-row inmate a second time, following a failed first attempt, the state is neither (1) attempting to subject that defendant to a second trial following an acquittal, nor (2) attempting to impose a “second” punishment beyond that permitted by the legislature.

Nonetheless, we need not reach a definitive conclusion regarding the scope of the Double Jeopardy Clause in the second-execution context because, regardless of the correctness of the Ohio Supreme Court’s reasoning, that court plainly did not misapply clearly established Supreme Court precedent. Indeed, not only is the Ohio Supreme Court’s conclusion consistent with the Supreme Court’s general double jeopardy jurisprudence, as outlined above, but also the Ohio Supreme Court reached its conclusion without the benefit of *any* on-point Supreme Court guidance, thus rendering AEDPA deference particularly appropriate. *See, e.g., Litschewski v.*

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Dooley, 792 F.3d 1012, 1016–17 (8th Cir. 2015) (rejecting petitioner’s novel double jeopardy claim on AEDPA review and deferring to state court’s decision, in large part because the Supreme Court had addressed the issue at only a “high level of generality”); *see also Wright*, 552 U.S. at 126 (“Because our cases give no clear answer to the question presented, let alone one in [the petitioner’s] favor, it cannot be said that the state court unreasonably applied clearly established Federal law.” (citations omitted)).⁶

Broom makes two arguments to the contrary. Neither convinces.

First, Broom makes a textualist argument that, because the state put his life “in jeopardy” once (during the first execution), it would violate the plain language of the Clause to put his life “in jeopardy” again (during a second execution). U.S. Const., amend. V (“[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb[.]”); *see, e.g.*, Appellant’s Br. at 64. But this argument confuses textualism with literalism. Again, in the context of the Fifth Amendment, it is well established that the phrase “to be . . . put in jeopardy of life” refers to “[t]he risk of conviction and punishment that a criminal defendant faces at trial.” Black’s Law Dictionary (11th ed. 2019) (defining “jeopardy”) (emphasis added); *see also* Random House Webster’s Unabridged Dictionary 1026 (2d ed. 1993) (distinguishing between jeopardy’s ordinary meaning and jeopardy’s “legal” meaning). Accepting Broom’s contrary, literal definition of “jeopardy” would require the panel to ignore that context, which of course even the most ardent of textualists would not do. *Cf. Deal v. United States*, 508 U.S. 129, 132 (1993) (Scalia, J.) (“Petitioner’s contention overlooks, we think, this fundamental principle of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used.”).

⁶If anything, the Ohio Supreme Court’s reasoning may have been *more* favorable to Broom than U.S. Supreme Court precedent required it to be. That is because the court implied that, had the first execution attempt proceeded “to the point of injection of a lethal drug into the IV line,” and failed, the Clause *would* have prevented Ohio from attempting to execute Broom again. *See Broom*, 51 N.E.3d at 627 (stating that because the state’s first execution attempt “did not proceed to the point of injection of a lethal drug into the IV line, jeopardy never attached,” and, as a result, a second execution attempt would not implicate “the Fifth Amendment protection against double jeopardy”). For the reasons explained above, this proposition is debatable. But because the state court’s ultimate conclusion was not in defiance of clearly established Supreme Court precedent, we need not say more here.

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Second, Broom latches onto the phrase “no man can be twice lawfully punished for the same offence”—a double jeopardy maxim dating back to *Ex parte Lange*—to argue that, if Ohio attempts to execute him again, it would run afoul of this well-established command (presumably because a second execution attempt would constitute a verboten “second punishment”). Appellant Reply Br. at 16. But just as Broom’s prior argument read the term “jeopardy” out of its definitional context, this argument reads the *Lange* maxim out of its precedential context. As the Supreme Court explained in *Jones v. Thomas*, *Lange* “stands for the uncontested proposition that the Double Jeopardy Clause prohibits punishment *in excess of that authorized by the legislature . . . not for the broader rule suggested by its dictum.*” 491 U.S. at 383 (emphasis added). And because allowing Ohio to complete its execution of Broom would not go beyond what Ohio’s legislature has authorized—for better or for worse, Ohio still permits capital punishment—the *Lange* maxim cannot help Broom here.

III. CONCLUSION

For these reasons, we **AFFIRM** the district court’s judgment.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 19-3356

ROMELL BROOM,

Petitioner - Appellant,

v.

TIM SHOOP, Warden,

Respondent - Appellee.

FILED
Jun 23, 2020
DEBORAH S. HUNT, Clerk

Before: BATCHELDER, MOORE, and GIBBONS, Circuit Judges.

JUDGMENT

On Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION THEREOF, it is ORDERED that the district court's denial of Romell Broom's petition for a writ of habeas corpus is AFFIRMED.

ENTERED BY ORDER OF THE COURT



Deborah S. Hunt, Clerk

Appendix B

APPX 0020

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Romell Broom,)	Case No. 1:10 CV 2058
)	
Petitioner,)	
)	JUDGE CHRISTOPHER A. BOYKO
-vs-)	
)	
Charlotte Jenkins, Warden,)	<u>MEMORANDUM OF OPINION</u>
)	<u>AND ORDER</u>
Respondent.)	

INTRODUCTION

On September 15, 2009, the State of Ohio attempted to execute Petitioner Romell Broom by lethal injection. Broom was sentenced to death in 1985 for the rape and murder of Tryna Middleton. However, the execution team could not access a vein to administer the lethal drugs – despite more than a dozen attempts over two hours – and the procedure was aborted. The State intends to try again in June 2020. Broom has filed in this Court a second-in-time Petition and Amended Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, challenging the constitutionality of his death sentence and seeking to bar a second execution attempt. (Docs. 1, 18.) Respondent Warden Charlotte Jenkins has filed a Return of Writ to the Amended Petition (Doc. 21.) and Broom has filed a Traverse. (Doc. 30.) For the following reasons, the Court denies Broom’s Amended Petition.

Appendix C

RELEVANT PROCEDURAL HISTORY

A. Broom's Conviction and Initial State and Federal Challenges

Broom was convicted by a jury and sentenced to death in October 1985 in an Ohio state court for the rape and murder of Tryna Middleton. *See State v. Broom*, 40 Ohio St. 3d 277, 277-80 (Ohio 1988) (providing a detailed account of Broom's crimes and prosecution). Broom's conviction and sentence were affirmed on direct appeal. *See State v. Broom*, No. 51237, 1987 WL 14401 (Ohio Ct. App. July 23, 1987); *Broom*, 40 Ohio St. 3d at 280; *Broom v. Ohio*, 490 U.S. 1075 (1989). He was unsuccessful in state post-conviction proceedings. *See State v. Broom*, No. 72581, 1998 WL 230425 (Ohio Ct. App. May 7, 1998); *State v. Broom*, 83 Ohio St. 3d 1430 (Ohio 1998).

Broom then sought federal habeas relief. In June 1999, he filed a Petition for Writ of Habeas Corpus in this Court, asserting thirty grounds for relief. (*See* Case No. 1:99 CV 30 ("Habeas 1"), Doc. 13.) After conducting an evidentiary hearing on certain of his claims in January 2002 (*see* Habeas 1, Docs. 100-05), another judge on this Court denied Broom's Petition in August 2002 (Habeas 1, Doc. 113).¹ The Sixth Circuit Court of Appeals affirmed that ruling. *Broom v. Mitchell*, 441 F.3d 392 (6th Cir. 2006), *reh'g and reh'g en banc denied* (Aug. 9, 2006). The United States Supreme Court denied *certiorari*. *Broom v. Mitchell*, 549 U.S. 1255 (2007), *reh'g denied*, 549 U.S. 1363 (2007).

Soon after, Broom returned to state court and filed a successor Petition for Post-Conviction Relief in the trial court in which he asserted among other things, a claim under

¹ Judge Kathleen O'Malley initially presided over this case. The case was transferred to Judge Christopher A. Boyko on November 14, 2011. (Doc. 4.)

Brady v. Maryland, 373 U.S. 83 (1963).² See *State v. Broom*, No. 91297, 2009 WL 2263824, at *4 (Ohio Ct. App. July 30, 2009). Broom’s Petition ultimately was denied. See *id.* (reversing trial court’s dismissal of petition); *State v. Broom*, 123 Ohio St. 3d 114 (Ohio 2009) (reversing court of appeals), *reconsideration denied*, 123 Ohio St. 3d 1475 (Ohio 2009).

Broom then filed a Motion in this Court seeking relief from the Court’s earlier judgment dismissing his Petition so that the Court could reopen the case and address the *Brady* claim that was the subject of his post-conviction review. (Habeas 1, Doc. 133.) The Court denied the Motion. (Habeas 1, Doc. 141.) The Sixth Circuit affirmed that judgment. (Habeas 1, Doc. 145.)

B. The Failed Execution Attempt

In the midst of Broom’s post-conviction proceedings, on April 22, 2009, the Ohio Supreme Court set Broom’s execution date for September 15, 2009. See *State v. Broom*, 122 Ohio St. 3d 1497 (Ohio 2009).

The execution, however, was not carried out. Despite repeated attempts over two hours, the execution team could not access a vein to deliver the lethal injection. The Ohio Supreme Court set forth the following facts relating to the failed execution attempt:

Facts of September 15, 2009

Broom was transported to the Southern Ohio Correctional Facility (“Lucasville”) on September 14, 2009, in anticipation of his execution

² In *Brady*, the Supreme Court held that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment.” *Brady*, 373 U.S. at 87. Broom raised this claim in his first federal habeas Petition, but this Court declined to review it because Broom had not exhausted it in state courts. (See Habeas 1, Doc. 113 at 43-49.)

scheduled for the next day. Upon his arrival at Lucasville, a nurse and a phlebotomist conducted a vein assessment and found that Broom's right-arm vein appeared accessible, but his left-arm vein seemed less so. Prison officials communicated this information to Edwin C. Voorhies Jr., the regional director for the Office of Prisons of the Ohio Department of Rehabilitation and Correction ("ODRC"), and the medical team assured him that this would not present a problem.

At 1:59 p.m. on September 15, the warden finished reading the death warrant to Broom. One minute later, Team Members 9 (a female) and 21 (a male) entered the holding cell to prepare the catheter sites.

Team Member 9 made three attempts to insert a catheter into Broom's left arm but was unable to access a vein. At the same time, Team Member 21 made three unsuccessful stabs into Broom's right arm. After a short break, Member 9 made two more insertions, the second of which caused Broom to scream aloud from the pain.

Member 21 managed to insert the IV catheter into a vein, but then he lost the vein and blood began running down Broom's arm. When that occurred, Member 9 rushed out of the room, saying "no" when a security officer asked if she was okay.

Director Voorhies testified that he could tell there was a problem in the first 10 to 15 minutes. Warden Phillip Kerns saw the team make six or seven attempts on Broom's veins during the same 10-to-15-minute period. According to Kerns, the team members did hit veins, but as soon as they started the saline drip, the vein would bulge, making it unusable.

About 15 minutes into the process, Kerns and Voorhies saw Member 9 leave the holding cell. Voorhies described her as sweating "profusely" and heard her say that she and Member 21 had both accessed veins, but the veins "blew." Member 17 then entered the holding cell and made "several attempts" to access a vein in Broom's left arm. Simultaneously, Member 21 continued his attempts on Broom's right arm.

Terry Collins, who was then the director of the ODRC, called a break about 45 minutes into the process to consult with the medical team. The break lasted 20 to 25 minutes. The medical team reported that they were gaining IV access but could not sustain it when they tried to run saline through the line. They expressed "clear concern" about whether they would get usable veins. But because they said that there was a reasonable chance of establishing venous access, the decision was made to continue.

By this time, Broom was in a great deal of pain from the puncture wounds, which made it difficult for him to move or stretch his arms. The second session commenced with three medical team members—9, 17, and 21—examining Broom's arms and hands for possible injection sites. For the first time, they also began examining areas around and above his elbow as well as his legs. They also reused previous insertion sites, and as they continued inserting catheter needles into already swollen and bruised sites, Broom covered his eyes and began to cry from the pain. Director Voorhies remarked that he had never before seen an inmate cry during the process of venous access.

After another ten minutes or so, Warden Kerns asked a nurse to contact the Lucasville physician to see if she would assess Broom's veins and offer advice about finding a suitable vein. Broom later stated that he saw “an Asian woman,” whom he erroneously identified as “the head nurse,” enter the chamber. Someone handed her a needle, and when she inserted it, she struck bone, and Broom screamed from the pain. At the same time, another team member was attempting to access a vein in Broom's right ankle.

The Lucasville physician confirmed that she came to Broom's cell, examined his foot, and made one unsuccessful attempt to insert a needle but quickly concluded that the effort would not work. By doing so, she disobeyed the warden's express instructions to observe only and not get involved. The physician examined Broom's foot but could see no other vein.

After the physician departed, the medical team continued trying to establish an IV line for another five to ten minutes. In all, the second session lasted approximately 35 to 40 minutes.

During the second break, the medical team advised that even if they successfully accessed a vein, they were not confident that the site would remain viable throughout the execution process. The governor's office had signaled its willingness to grant a reprieve, and so the decision was made to halt the execution for the day.

Dr. Jonathan Groner examined and photographed Broom three or four days afterward. The photographs show 18 injection sites: one on each bicep, four on his left antecubital (forearm), three on his right antecubital, three on his left wrist, one on the back of his left hand, three on the back of his right hand, and one on each ankle. Prison officials later confirmed that he was stuck at least 18 times.

Dr. Mark Heath met with Broom one week after the event. Dr. Heath observed “considerable bruising” and a lot of “deep and superficial” tissue damage consistent with multiple probing. Dr. Heath also posited that the actual number

of catheter insertions was much higher than the number of needle marks, because according to what Broom told him, the medical team would withdraw the catheter partway and then reinsert it at a different angle, a procedure known as “fishing.”

State v. Broom, 146 Ohio St. 3d 60, 61-63 (Ohio 2016).

C. Broom’s Initial State and Federal Litigation Challenging Any Further Execution Attempt

On September 18, 2009, three days after the failed execution, Broom filed a civil rights action under 42 U.S.C. § 1983 in the United States District Court for the Southern District of Ohio, challenging Ohio’s lethal injection execution protocol and seeking to prevent the State from attempting to execute him again. (Case No. 2:09 CV 823 (“§ 1983 Case”), Doc. 3).³ In an Amended Complaint, Broom argued, among other things, that a second execution attempt would violate the Eighth Amendment’s prohibition on cruel and unusual punishments and the Fifth Amendment right against double jeopardy. (§ 1983 Case, Doc. 40.) *See also Broom v. Strickland*, 2010 WL 3447741, at *1 (S.D. Ohio Aug. 27, 2010) (Frost, J.). The defendants moved to dismiss the Amended Complaint, which the court partially granted on August 27, 2010, severing and dismissing Broom’s Eighth Amendment claim seeking to bar a second execution attempt without prejudice, but retaining jurisdiction of Broom’s other claims challenging the constitutionality of Ohio’s lethal injection execution protocol. *Id.* at *2-4. The court stated that “[t]here is no doubt that the Eighth Amendment applies to Plaintiff’s situation[,]” *id.* at *2, but that “habeas presents the proper vehicle to address the constitutional issues arising from the failed

³ On the same day, Broom filed an action for a writ of habeas corpus in the Ohio Supreme Court seeking to prevent any further execution attempts. (Case No. 2009-1686). He later voluntarily dismissed that action. *In re Broom*, 123 Ohio St. 3d 1485 (Ohio 2009).

execution attempt and Ohio's intent to try again[,]" *id.* at *4.

In 2011, the Southern Ohio District Court consolidated Broom's § 1983 Case with other § 1983 lethal-injection litigation into a case with more than one hundred death-sentenced inmates as plaintiffs, entitled *In re Ohio Execution Protocol Litigation* ("IOEPL") (Case No. 2:11 CV 1016). (See Case No. 2:09 CV 823, Doc. 284.)

D. Second Federal Habeas Corpus Petition

On September 14, 2010, Broom filed the second-in-time Petition for Writ of Habeas Corpus now before the Court. (Doc. 1.) His Petition asserted three claims for relief, stated as:

1. Any further attempts to execute Romell Broom by any means or methods will violate the U.S. Constitution's prohibition against cruel and unusual punishments.
2. The prohibition against double jeopardy would be violated by another attempt to execute Romell Broom.
3. Any further attempts to execute Broom by any means or methods would violate Broom's right to substantive due process as guaranteed by the Fourteenth Amendment to the United States Constitution.

(Doc. 1-1 at 2-3 (capitalization altered).)⁴

On September 17, 2010, Broom moved to stay the case and hold it in abeyance pending his exhaustion of available state-court remedies for his constitutional challenges to any further execution attempt. (Doc. 3.) The Court granted the motion on November 18, 2010. (Doc. 7.)

E. Exhaustion of State-Court Remedies Relating to a Second Execution

⁴ All references to page numbers of documents in the Court's electronic court filing system ("ECF") are to the page numbers of the individual ECF documents, not the original page numbers or ECF "PageID" numbers.

Attempt

1. State Habeas Action

Meanwhile, on the same day he filed his second federal habeas Petition, September 14, 2010, Broom filed a second state-court habeas action in the Ohio Supreme Court. *State v. Broom* (Case No. 2010-1609). He raised four claims, stated as:

1. Any further attempts to execute Romell Broom will violate the state and federal constitutional prohibitions against cruel and unusual punishments and the Ohio law requiring that executions be quick and painless: Eighth and Fourteenth Amendments to the United States Constitution; Art. I, Sec. 9, 10, and 16 of the Ohio Constitution; Ohio Revised Code § 2949.22(A).
2. Imposition of the death penalty under the circumstances of this case would violate Article I, Sections 1, 2, 8, 9, 10 and 16 of the Ohio Constitution.
3. The prohibition against double jeopardy would be violated by another attempt to execute Romell Broom: Fifth and Fourteenth Amendments to the United States Constitution; Art. I, Section 10, Ohio Constitution.
4. His right to substantive due process would be violated by another attempt to execute Romell Broom; Fourteenth Amendment to the United States Constitution; Art. I, Section 16, Ohio Constitution.

(Doc. 37-1 at 13, 16, 17, 18 (capitalization altered).)

The Ohio Supreme Court summarily dismissed the case on December 2, 2010. *In re Broom*, 127 Ohio St. 3d 1450 (Ohio 2010). The Supreme Court denied *certiorari* on May 2, 2011. *Broom v. Bobby*, 563 U.S. 977 (2011).

2. Successive Petition for Post-Conviction and Declaratory Relief

On September 15, 2010, Broom filed a Successive Petition for Post-Conviction and Declaratory Relief in the state trial court. (Doc. 19-10 at 2-35.) He raised four claims, stating:

1. Any further attempts to execute Romell Broom will violate the state and federal constitutional prohibitions against cruel and unusual punishments and the Ohio law requiring that executions be quick and painless: Eighth and Fourteenth Amendments to the United States Constitution; Ohio Revised Code § 2949.22(A).
2. Imposition of the death penalty under the circumstances of this case would violate Article I, Sections 1, 2, 8, 9, 10 and 16 of the Ohio Constitution.
3. The prohibition against double jeopardy would be violated by another attempt to execute Romell Broom: Fifth and Fourteenth Amendments to the United States Constitution; Art. I, Section 10, Ohio Constitution.
4. Broom is entitled to a declaratory judgment in his favor.

(*Id.* at 21, 25, 26, 28.) Broom sought discovery and an evidentiary hearing. (*Id.* at 29.)

Without conducting a hearing or allowing discovery, the trial court denied Broom's Petition on April 7, 2011. (*Id.* at 369-75.)

Broom filed a timely Notice of Appeal with the state appellate court. (*Id.* at 376-86.) In his appellate brief, he raised the following assignments of error:

1. The trial court erred when it denied Broom an evidentiary hearing on his postconviction and declaratory judgment claims.
2. The trial court erred when it found that the cruel and unusual punishment clauses of the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Sections 9 and 16 of the Ohio Constitution do not bar another attempt to execute Broom.
3. Broom's rights under the Ohio Revised Code § 2949.22(A), Article I, Sections 1, 2, 8, 9, 10, and 16 of the Ohio Constitution, and the Due Process Clause of the United States Constitution were violated when the state failed to conduct Broom's execution attempt on September 15, 2009[,] in conformity with Ohio law.
4. The trial court erred when it found that a second attempt to execute Broom would not violate the prohibitions against being placed twice in jeopardy for the same offense in the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio

Constitution.

5. The trial court erred when it denied Broom declaratory relief under Ohio Revised Code § 2721.01 *et seq.* and Civ. R. 57.

(Doc. 19-11 at 69, 72, 76, 90.)

The state court of appeals affirmed the trial court's judgment on February 16, 2012, with one justice dissenting. *State v. Broom*, No. 96747, 2012 WL 504504 (Ohio Ct. App. Feb. 16, 2012).

Broom filed a timely Notice of Appeal with the Ohio Supreme Court. (Doc. 19-11 at 3-5.) In an Amended Memorandum in Support of Jurisdiction, he raised the following six propositions of law:

1. In an action for postconviction relief, a petition that presents sufficient operative facts supported by evidence *dehors* the record meets the required pleading standard and, to comport with due process and provide adequate corrective process to the Petitioner, must not be summarily dismissed without an evidentiary hearing. U.S. CONST. AMEND. XIV.
2. The lower courts erred when they found that the cruel and unusual punishments clauses of the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Section 9 of the Ohio Constitution, do not bar another attempt to execute Broom.
3. The lower courts denied Broom due process of law, an adequate corrective process, and his day in court on his "no multiple attempts" claims when (1) the trial court denied him discovery and a hearing, and (2) the appellate court, in a case of first impression and without prior notice to Broom, adopted a new case-specific and fact-based standard for adjudicating Broom's unique and rare constitutional claims, and then refused to remand the case to the trial court so that Broom could develop evidence and present argument that he meets that new standard.
4. The lower courts erred when they found that a second attempt to execute Broom would not violate the prohibitions against being placed twice in jeopardy for the same offense in the Fifth and Fourteenth

Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution.

5. The lower courts erred when they denied Broom declaratory relief under Ohio Rev. Code § 2721.01 *et seq.* and Civ. R. 57.
6. The lower courts erred when they found no denial of Broom's rights under Ohio Revised Code § 2949.22(A), Article I, Sections 1, 2, 8, 9, 10, and 16 of the Ohio Constitution, and the Due Process Clause of the United States Constitution when the State failed to conduct Broom's execution attempt on September 15, 2009 in conformity with Ohio law.

(Doc. 19-11 at 103-05 (capitalization altered).)

The court accepted Broom's appeal on his Propositions of Law Nos. 2, 3, and 4 on May 28, 2014. (*Id.* at 314.) In his merits brief, Broom presented the following three propositions of law:

1. The lower courts erred when they found that the Cruel and Unusual Punishments Clauses of the United States and Ohio Constitutions do not bar another attempt to execute Broom.
2. The lower courts erred when (1) the appellate court adopted a new case-specific and fact-based standard for adjudicating Broom's unique and rare constitutional claims, and then refused to remand the case to the trial court and (2) when the trial court denied him discovery and a hearing.
3. The lower courts erred when they found that a second attempt to execute Broom would not violate the prohibitions against being placed twice in jeopardy for the same offense in the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution.

(*Id.* at 320-21 (capitalization altered).)

The Ohio Supreme Court affirmed the state appellate court's judgment in a 4-3 decision on June 9, 2015, finding no constitutional violations. *Broom*, 146 Ohio St. 3d 60, paragraphs 1, 4, 5 of the syllabus.

Broom filed a timely Petition for Writ of *Certiorari* in the United States Supreme Court. (Doc. 19-11 at 602.) The Court denied the Petition, with two justices dissenting. *Broom v. Ohio*, 137 S. Ct. 590 (2016). Broom petitioned for a rehearing, which also was denied. *Broom v. Ohio*, 137 S. Ct. 1138 (2017).

F. Reinstated Second Federal Habeas Corpus Action

Broom has now returned to this Court. On June 20, 2017, he filed an Amended Petition for Writ of Habeas Corpus. (Doc. 18.) Respondent filed a Return of Writ on August 21, 2017. (Doc. 21.)

On September 21, 2017, Broom filed a Motion for Leave to Conduct Discovery and/or to Expand the Habeas Record. (Doc. 22.) He sought discovery relating to his first (Eighth Amendment) and third (due process) claims and requested an expansion of the record. (Doc. No. 22.)⁵ On September 27, 2017, Broom filed under seal a motion requesting funding for the assistance of certain experts. (Doc. No. 25.) Respondent opposed Broom's request for discovery on October 5, 2017. (Doc. No. 26.) Broom replied to Respondent's brief in opposition on October 12, 2017. (Doc. No. 27.)

On April 4, 2018, the Court denied Broom's Motions without prejudice, subject to reconsideration or renewal if the Court determines upon further review of the pleadings, that the claims for which Broom seeks discovery were not adjudicated on the merits but are

⁵ Specifically, Broom requested information regarding Ohio's execution practices and protocols in all executions conducted after his attempted execution in 2009 until the present through: (1) depositions of the ODRC Director Gary Mohr, Southern Ohio Correctional Facility Warden Ron Erdos and six "team members" identified by numbers, responsible for carrying out executions; and (2) documents, records, and transcripts contained in the court record of *IOEPL*. (*Id.* at 14-22.) In addition, or in the alternative, he asked for the record to be expanded to include *IOEPL* records. (*Id.* at 22-23.)

properly preserved for federal habeas review, or the state-court decisions regarding the claims at issue satisfy AEDPA's § 2254(d)(1) or (d)(2), or any other reason consideration of new evidence would be deemed appropriate. (Doc. 28.)

On June 26, 2018, Broom filed a Traverse. (Doc. 30.) On July 10, 2018, he filed a Motion for an Evidentiary Hearing and/or Motion to Expand the Record, requesting an evidentiary hearing in the case and renewing his request in his previous Motion to Expand the Record (Doc. 22), along with certain additional materials. (Doc. 31.) Respondent opposed that Motion. (Doc. 32.)

PETITIONER'S CLAIMS FOR RELIEF

In his Petition, Broom asserts four claims for relief, stated as follows:

1. Any further attempts to execute Romell Broom by any means or methods will violate the U.S. Constitution's prohibition against cruel and unusual punishments.
2. The prohibition against double jeopardy would be violated by another attempt to execute Romell Broom.
3. The Ohio state courts denied Broom due process of law, and adequate corrective process, and his day in court on his federal constitutional claims.
4. Any further attempts to execute Broom by any means or methods would violate Broom's right to procedural and substantive due process as guaranteed by the Fourteenth Amendment to the United States Constitution.

(Doc. 18 at 64, 85, 103, 119 (capitalization altered).)

STANDARDS OF REVIEW

A. AEDPA Review

Broom's Amended Petition for Writ of Habeas Corpus is governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). See *Lindh v. Murphy*, 521 U.S. 320, 336 (1997) (AEDPA governs federal habeas petitions filed after Act's effective date). AEDPA, which amended 28 U.S.C. § 2254, was enacted "to reduce delays in the execution of state and federal criminal sentences, particularly in capital cases, and 'to further the principles of comity, finality, and federalism.'" *Woodford v. Garceau*, 538 U.S. 202, 206 (2003) (quoting *(Michael) Williams v. Taylor*, 529 U.S. 420, 436 (2000)). The Act "recognizes a foundational principle of our federal system: State courts are adequate forums for the vindication of federal rights." *Burt v. Titlow*, 571 U.S. 12, 18 (2013). It therefore "erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Id.* at 19.

One of AEDPA's most significant limitations on the federal courts' authority to issue writs of habeas corpus is found in § 2254(d). That provision forbids a federal court from granting habeas relief with respect to a "claim that was adjudicated on the merits in State court proceedings" unless the state-court decision either:

- (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
- (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Habeas courts review the "last *explained* state-court judgment" on the federal claim

at issue. *Ylst v. Nunnemaker*, 501 U.S. 797, 805 (1991) (emphasis in original). A state court has adjudicated a claim “on the merits” and AEDPA deference applies, regardless of whether the state court provided little or no reasoning at all for its decision. “When a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.” *Harrington v. Richter*, 562 U.S. 86, 99 (2011).

“Clearly established Federal law” for purposes of § 2254(d)(1) “is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.” *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). It includes “only the holdings, as opposed to the dicta, of [Supreme Court] decisions.” *White v. Woodall*, 572 U.S. 415, 419 (2014) (internal quotation marks and citations omitted). The state-court decision need not refer to relevant Supreme Court cases or even demonstrate an awareness of them; it is sufficient that the result and reasoning are consistent with Supreme Court precedent. *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). Also, a state court does not act contrary to clearly established law when the precedent of the Supreme Court is ambiguous or nonexistent. *See, e.g., Mitchell v. Esparza*, 540 U.S. 12, 17 (2003) (per curiam).

A state-court decision is contrary to “clearly established Federal law” under § 2254(d)(1) only “if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts.” *Williams v. Taylor*,

529 U.S. 362, 412-13 (2000). Also, “review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits.” *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011).

A state-court decision is an “unreasonable determination of the facts” under § 2254(d)(2) only if the court made a “clear factual error.” *Wiggins v. Smith*, 539 U.S. 510, 528-29 (2003). The petitioner bears the burden of rebutting the state court’s factual findings “by clear and convincing evidence.” *Burt*, 571 U.S. at 18; *Rice v. White*, 660 F.3d 242, 250 (6th Cir. 2011). This requirement mirrors the “presumption of correctness” AEDPA affords state-court factual determinations, which only can be overcome by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).⁶ The Supreme Court has cautioned, “a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.” *Burt*, 571 U.S. at 18 (quoting *Wood v. Allen*, 558 U.S. 290, 301 (2010)).

Indeed, the Supreme Court repeatedly has emphasized that § 2254(d), as amended by AEDPA, is an intentionally demanding standard, affording great deference to state-court adjudications of federal claims. The Court has admonished that a reviewing court may not “treat[] the reasonableness question as a test of its confidence in the result it would reach under *de novo* review,” and that “even a strong case for relief does not mean the state court’s contrary conclusion was unreasonable.” *Richter*, 562 U.S. at 102; *see also Schriro*

⁶ Section 2254(e)(1) provides: “In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

v. Landrigan, 550 U.S. 465, 473 (2007) (“The question under AEDPA is not whether a federal court believes the state court’s determination was incorrect but whether that determination was unreasonable – a substantially higher threshold.”). Rather, § 2254(d) “reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems” and does not function as a “substitute for ordinary error correction through appeal.” *Richter*, 562 U.S. at 102-03 (internal quotation marks omitted). A petitioner, therefore, “must show that the state court’s ruling . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *Id.* at 103. This is a very high standard, which the Court readily acknowledges: “If this standard is difficult to meet, that is because it is meant to be.” *Id.* at 102.

But AEDPA “stops short of imposing a complete bar on federal court relitigation of claims already rejected in state proceedings.” *Id.* “[E]ven in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief.” *Miller-El*, 537 U.S. at 340. Rather, “under AEDPA standards, a federal court can disagree with a state court’s factual determination and ‘conclude the decision was unreasonable or that the factual premise was incorrect by clear and convincing evidence.’” *Baird v. Davis*, 388 F.3d 1110, 1123 (7th Cir. 2004) (quoting *Miller-El*, 537 U.S. at 340) (Posner, J.). Federal habeas courts may, for example, review *de novo* an exhausted federal claim where a state court misapplied a procedural bar and did not review the claim on the merits. *See, e.g., Hill v. Mitchell*, 400 F.3d 308, 313 (6th Cir. 2005). They likewise may review *de novo* claims adjudicated on the merits in state court if the petitioner meets the criteria for one of § 2254(d)’s exceptions. *See, e.g., Wiggins*, 539

U.S. at 534 (performing *de novo* review under *Strickland*'s second prong because the state court unreasonably applied the law in resolving *Strickland*'s first prong).

B. Exhaustion and Procedural Default

Under AEDPA, state prisoners must exhaust all possible state remedies, or have no remaining state remedies, before a federal court will review a petition for a writ of habeas corpus. 28 U.S.C. § 2254(b) and (c); *see also* *Rose v. Lundy*, 455 U.S. 509 (1982). This entails giving the state courts “one full opportunity to resolve any constitutional issues by invoking one complete round of the State’s established appellate review process.”

O’Sullivan v. Boerckel, 526 U.S. 838, 845 (1999). In other words, “the highest court in the state in which the petitioner was convicted [must have] been given a full and fair opportunity to rule on the petitioner’s claims.” *Manning v. Alexander*, 912 F.2d 878, 881 (6th Cir. 1990). The exhaustion requirement, however, “refers only to remedies still available at the time of the federal petition.” *Engle v. Isaac*, 456 U.S. 107, 125 n.28 (1982). It “does not require pursuit of a state remedy where such a pursuit is clearly futile.” *Wiley v. Sowders*, 647 F.2d 642, 647 (6th Cir. 1981).

Procedural default is a related but “distinct” concept from exhaustion. *Williams v. Anderson*, 460 F.3d 789, 806 (6th Cir. 2006). It occurs when a habeas petitioner fails to obtain consideration of a federal constitutional claim by state courts because he failed to: (1) comply with a state procedural rule that prevented the state courts from reaching the merits of the petitioner’s claim; or (2) fairly raise that claim before the state courts while state remedies were still available. *See generally* *Wainwright v. Sykes*, 433 U.S. 72, 80, 84-87 (1977); *Engle*, 456 U.S. at 125 n.28; *Williams*, 460 F.3d at 806.

Where a state court declines to address a prisoner’s federal claim because the

prisoner has failed to meet a state procedural requirement, federal habeas review is barred as long as the state judgment rested on “independent and adequate” state procedural grounds. *Coleman v. Thompson*, 501 U.S. 722, 729 (1991). To be independent, a state procedural rule and the state courts’ application of it must not rely in any part on federal law. *Id.* at 732-33. To be adequate, a state procedural rule must be “‘firmly established’ and ‘regularly followed’” by the state courts at the time it was applied. *Beard v. Kindler*, 558 U.S. 53, 60-61 (2009).⁷

A petitioner also may procedurally default a claim by failing to raise the claim in state court and pursue it through the state’s “‘ordinary appellate review procedures,’” if, at the time of the federal habeas petition, state law no longer allows the petitioner to raise the claim. *Williams*, 460 F.3d at 806 (quoting *O’Sullivan*, 526 U.S. at 848); *see also Baston v. Bagley*, 282 F. Supp. 2d 655, 661 (N.D. Ohio 2003) (“Issues not presented at each and

⁷ In *Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986), the Sixth Circuit established the now familiar test to be followed when the state argues that a habeas claim is defaulted because of a prisoner’s failure to observe a state procedural rule. It is:

First, the federal court must determine whether there is a state procedural rule that is applicable to the petitioner’s claim and whether the petitioner failed to comply with that rule. Second, the federal court must determine whether the state courts actually enforced the state procedural sanction – that is, whether the state courts actually based their decisions on the procedural rule. Third, the federal court must decide whether the state procedural rule is an adequate and independent state ground on which the state can rely to foreclose federal review of a federal constitutional claim. Fourth, if the federal court answers the first three questions in the affirmative, it would not review the petitioner’s procedurally defaulted claim unless the petitioner can show cause for not following the procedural rule and that failure to review the claim would result in prejudice or a miscarriage of justice.

Williams v. Coyle, 260 F.3d 684, 693 (6th Cir. 2001) (citing *Maupin*, 785 F.2d at 138) (further citations omitted).

every level [of the state courts] cannot be considered in a federal habeas corpus petition.”). Under these circumstances, while the exhaustion requirement is technically satisfied because there are no longer any state-court remedies available to the petitioner, the petitioner’s failure to have the federal claims fully considered in the state courts constitutes a procedural default of those claims, barring federal habeas review. *Williams*, 460 F.3d at 806, (“Where state court remedies are no longer available to a petitioner because he or she failed to use them within the required time period, procedural default and not exhaustion bars federal court review.”); *see also Gray v. Netherland*, 518 U.S. 152, 161-62 (1996) (“Because the exhaustion requirement ‘refers only to remedies still available at the time of the federal petition,’ . . . , it is satisfied ‘if it is clear that [the habeas petitioner’s] claims are now procedurally barred under [state] law’” (internal citations omitted)).

Furthermore, to “fairly present” a claim to a state court, a petitioner must assert both its legal and factual basis. *Williams*, 460 F.3d at 806 (citing *McMeans v. Brigano*, 228 F.3d 674, 681 (6th Cir. 2000)). Most importantly, a “petitioner must present his claim to the state courts as a federal constitutional issue – not merely as an issue arising under state law.” *Id.* (quoting *Koontz v. Glossa*, 731 F.2d 365, 368 (6th Cir. 1984)).

In determining whether a claim is procedurally defaulted and barred from consideration on federal habeas review, the federal court again looks to the last state court rendering a reasoned opinion on that claim. *Ylst*, 501 U.S. at 805. If the state court “clearly and expressly states that its judgment rests on a state procedural bar,” then the claim is procedurally defaulted.⁸ *Harris v. Reed*, 489 U.S. 255, 263 (1989). Conversely, if

⁸ Where a later state-court decision rests upon a prohibition against *further* state review, the decision “neither rests upon procedural default nor lifts a pre-existing procedural default, [and]

the last state court presented with the claim reaches its merits, then the procedural bar is removed and the federal habeas court may consider the merits of the claim in its review. *Ylst*, 501 U.S. at 801.

A petitioner may overcome procedural default by demonstrating cause for the default and actual prejudice that resulted from the alleged violation of federal law, or that there will be a “fundamental miscarriage of justice” if the claim is not considered. *Coleman*, 501 U.S. at 750. “[C]ause’ under the cause and prejudice test must be something external to the petitioner, something that cannot be fairly attributed to him.” *Id.* To establish prejudice, a petitioner must demonstrate that the constitutional error “worked to his actual and substantial disadvantage.” *Perkins v. LeCureux*, 58 F.3d 214, 219 (6th Cir. 1995) (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)). “A fundamental miscarriage of justice results from the conviction of one who is ‘actually innocent.’” *Lundgren v. Mitchell*, 440 F.3d 754, 764 (6th Cir. 2006) (citing *Murray v. Carrier*, 477 U.S. 478, 496 (1986)).

A fundamental miscarriage of justice in capital cases also means actually innocent of the death penalty. *See Sawyer v. Whitley*, 505 U.S. 333, 347 (1992). In this sense, “[t]o show ‘actual innocence’ one must show by clear and convincing evidence that, but for the constitutional error, no reasonable jury would have found the petitioner eligible for the death penalty under the applicable state law.” *Id.* at 336. This “actual innocence” standard “must focus on the elements that render a defendant eligible for the death penalty.” *Hutton*

its effect upon the availability of federal habeas is nil” *Ylst*, , 501 U.S. at 804 n.3. In that case, habeas courts “look through” that later decision to the prior reasoned state-court judgment. *Id.* at 805 (“state rules against [a] superfluous recourse [of state habeas proceedings] have no bearing upon [a petitioner’s] ability to raise the [federal] claim in federal court”).

v. Mitchell, 839 F.3d 486, 498 (6th Cir. 2016) (citing *Sawyer*, 505 U.S. at 347).

C. Cognizability

To the extent a claim asserted in a federal habeas petition alleges state-law violations, it is not cognizable on federal habeas review and should be dismissed on that basis. “It is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States.” *Estelle v. McGuire*, 502 U.S. 62, 68 (1991) (citing 28 U.S.C. § 2241); *see also Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) (“[F]ederal habeas corpus relief does not lie for errors of state law.”); *Engle v. Isaac*, 456 U.S. 107, 121 n.21 (1982) (“We have long recognized that a ‘mere error of state law’ is not a denial of due process.”) (citation omitted)).

Moreover, “a state court’s interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.” *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (citing *Estelle*, 502 U.S. at 67-68). A federal habeas court does not function as an additional state appellate court reviewing state courts’ decisions on state law or procedure. *Allen v. Morris*, 845 F.2d 610, 614 (6th Cir. 1988).

State-court rulings on issues of state law may, however, “rise to the level of due process violations [if] they ‘offend[] some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’” *Seymour v. Walker*, 224 F.3d 542, 552 (6th Cir. 2000) (quoting *Montana v. Egelhoff*, 518 U.S. 37, 43 (1996)). But they must be “so egregious that [they] result in a denial of fundamental fairness.” *Bugh v. Mitchell*, 329 F.3d 496, 512 (6th Cir. 2003). Fundamental fairness under the Due Process

Clause is compromised where “the action complained of . . . violates those ‘fundamental conceptions of justice which lie at the base of our civil and political institutions,’ . . . and which define ‘the community’s sense of fair play and decency.’” *Dowling v. United States*, 493 U.S. 342, 352 (1990) (internal citations omitted). Courts, therefore, “‘have defined the category of infractions that violate ‘fundamental fairness’ very narrowly.’” *Id.* (quoting *Wright v. Dallman*, 999 F.2d 174, 178 (6th Cir. 1993)).

DISCUSSION

I. AEDPA Deference or *De Novo* Standard of Review

As a preliminary matter, the Court must address the “threshold question” of the proper standard of review governing Broom’s claims, or, more precisely, whether AEDPA deference or *de novo* review applies. *Robinson v. Howes*, 663 F.3d 819, 822 (6th Cir. 2011). As noted above, AEDPA’s deferential standard of review “applies only when a federal claim was ‘adjudicated *on the merits* in State court.’” *Johnson v. Williams*, 568 U.S. 289, 302 (2013) (emphasis in original) (quoting 28 U.S.C. § 2254(d)). Claims that were not resolved “on the merits” in state court receive the pre-AEDPA standard of review: *de novo* for questions of law (including mixed questions of law and fact) and clear error for questions of fact. *Robinson*, 663 F.3d at 823.

“A judgment is normally said to have been rendered ‘on the merits’ only if it was ‘delivered after the court . . . heard and *evaluated* the evidence and the parties’ substantive arguments.” *Williams*, 568 U.S. at 302 (emphasis in original) (quoting *Black’s Law Dictionary* 1199 (9th ed. 2009)). “Merits” in this context “is defined as ‘[t]he *intrinsic rights and wrongs of a case* as determined by *matters of substance*, in distinction from matters of form.’” *Id.* (emphasis in original) (quoting *Webster’s New International*

Dictionary 1540 (2d ed. 1954)).

Furthermore, “[w]hen a federal claim has been presented to a state court and the state court has denied relief, it may be presumed that the state court adjudicated the claim on the merits in the absence of any indication or state-law procedural principles to the contrary.” *Harrington v. Richter*, 562 U.S. 86, 99 (2011). The Supreme Court has found this presumption rebutted, for example, where there was clear evidence “that a federal claim was inadvertently overlooked in state court” and was not “evaluated based on the intrinsic right and wrong of the matter.” *Williams*, 568 U.S. at 303.

Broom argues that this Court should review the claims he presents here *de novo* because, in denying him an “adequate corrective process” to litigate those claims, Ohio courts did not adjudicate the claims on the merits and they do not fall within § 2254(d)’s purview. (Doc. 18 at 40-44; Doc. 30 at 32-34.) The state courts, he alleges, “failed to allow meaningful factual development, failed to utilize reliable means of finding facts, and made their determinations on an incomplete record.” (Doc. 18 at 40-41.)⁹

Broom focuses almost exclusively on the Ohio Supreme Court’s reliance on extra-record evidence in addressing his Eighth Amendment claim. In considering whether the State was likely to violate its execution protocol and cause severe pain in carrying out a

⁹ Broom made essentially the same argument to this Court in a Motion for Discovery (Doc. 22). There, he asserted that discovery relating to his constitutional claims was not barred by *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011), which limits habeas courts’ “review under § 2254(d)(1) . . . to the record that was before the state court that adjudicated the claim on the merits,” because, due to the state courts’ inadequate process, the Ohio Supreme Court did not adjudicate the claims on the merits. (See Doc. 22 at 13-14.) This Court rejected that argument, finding the claims at issue had been adjudicated on the merits in state court and denied the Motion. (See Doc. 28.) In his Traverse, Broom reasserts and incorporates by reference the arguments he presented in support of that Motion. (Doc. 30 at 33.)

second attempt at Broom's execution, the Ohio Supreme Court stated:

While we acknowledge that the state failed to follow the protocol in 2009 [during the Broom execution attempt], we cannot ignore what has transpired since then. The state has executed 21 death-row inmates since the attempted execution of Broom. See Ohio Department of Rehabilitation and Correction, *Ohio Executions – 1999 to Present*, <http://www.drc.ohio.gov/web/executed/executed25.htm> (last updated Jan. 16, 2014).

Broom, 146 Ohio St. 3d at 73.

This evidence not only was outside the record, Broom argues, it also “was no longer relevant or probative against Broom’s claims” because shortly after Broom’s failed execution attempt, Ohio changed its execution protocol in significant respects. (Doc. 18 at 41-43.) Broom notes that a dissent to the Ohio Supreme Court’s opinion criticized the majority for “seeking evidence outside the record to prove that the state has cured the problems in its execution procedures and seizing on an execution protocol that is no longer in effect.” *Broom*, 146 Ohio St. 3d at 74-75 (French, J., dissenting). Broom further asserts the information was “critically incomplete” due to “critical events” that occurred in October 2016, several months after the court issued its decision, when Ohio again changed its execution protocol. (Doc. 22 at 11-13.)

Broom cites as support for his argument *Gordon v. Braxton*, 780 F.3d 196 (4th Cir. 2015), and *Winston v. Kelly (Winston I)*, 592 F.3d 535 (4th Cir. 2010). (Doc. 30 at 33.) In those cases, the Fourth Circuit held that a state-court judgment on a “materially incomplete record” is not an adjudication on the merits for purposes of § 2254(d), particularly when the state court unreasonably refused to permit further factual development of the claim.

Gordon, 780 F.3d at 202; *Winston I*, 592 F.3d at 555-56; see also *Winston v. Pearson (Winston II)*, 683 F.3d 489, 496 (4th Cir. 2012). In *Brown v. Smith*, 551 F.3d 424, 428-29

(6th Cir. 2008), the Sixth Circuit similarly found no state-court adjudication of a *Brady* claim where the materials “that form[ed] the basis of the claim” were not before the court.

As Respondent argues, however, the Sixth Circuit rejected this approach in *Ballinger v. Prelesnik*, 709 F.3d 558 (6th Cir. 2013). (See Doc. 26 at 9-10.) While the court acknowledged in *Ballinger* that the Fourth Circuit’s reasoning in *Winston II* – “allowing a petitioner to supplement an otherwise sparse trial court record” – was “appealing, especially where he diligently sought to do so in state court,” it nonetheless found that “the plain language of *Pinholster* and *Harrington* precludes it.” *Id.* at 562. The Sixth Circuit explained, “In *Brown*, we concluded that the state court had not issued a decision on the merits because highly relevant documents were absent from the trial court record.” *Id.* at 561-62. But after *Harrington*, the court held, “[t]o the extent that *Brown* is inconsistent with *Harrington*’s definition of ‘on the merits,’ . . . it is no longer the law.” *Id.* at 562. The Sixth Circuit reaffirmed *Ballinger*’s assessment of *Brown*’s viability in *Loza v. Mitchell*, 766 F.3d 466, 494-95 (6th Cir. 2014), citing *Ballinger* and concluding that “it is unlikely that *Brown* remains good law in light of *Pinholster* and *Harrington*.” *Accord*, *Garuti v. Roden*, 733 F.3d 18, 23 (1st Cir. 2013) (refusing to follow *Winston I* and *Winston II* because they were “essentially overruled” by *Pinholster* and *Harrington*).

Nevertheless, Broom persists that at least with regard to his Eighth Amendment claim, *Harrington*’s presumption of adjudication “on the merits” does not apply because there is a “state-law procedural principle[] to the contrary.” (Doc. 27 at 2.) He points to Ohio law that “bar[s] any appellate decision based on evidence outside the record,” citing *Morgan v. Eads*, 104 Ohio St. 3d 142 (Ohio 2004); *Barnett v. Ohio Adult Parole Auth.*, 81 Ohio St. 3d 385, 387 (Ohio 1998); *State v. Ishmail*, 54 Ohio St. 2d 402, para. 1 of the

syllabus (Ohio 1978); and *Konigsberg v. Lamports Co.*, 116 Ohio St. 640, 641-42 (Ohio 1927). (Doc. 27 at 2.)

True, the Ohio Supreme Court has held that it is a “bedrock principle of appellate practice in Ohio” that “[a] reviewing court cannot add matter to the record before it, which was not a part of the trial court’s proceedings, and then decide the appeal on the basis of the new matter.” *Morgan*, 104 Ohio St. 3d at 144 (quoting *Ishmail*, 54 Ohio St. 2d at para. 1 of the syllabus). As Respondent argues, however, Ohio courts may take judicial notice of judicial opinions and public records. (Doc. 21 at 41 (citing Ohio R. Evid. 201(B))). *See also State ex rel. Coles v. Granville*, 116 Ohio St. 3d 231, 235-36 (Ohio 2007).

Moreover, Ohio’s high court did not decide Broom’s Eighth Amendment claim, or even the narrower issue of whether Broom had established that Ohio was likely to violate its execution protocol in the future, “on the basis” of the extra-record evidence that Ohio conducted twenty-one executions after Broom’s failed execution attempt. The high court concluded that Broom had not met this burden and Ohio had “a constitutional system that it appears to be following” on the basis of the district court’s factual findings and legal conclusions in the *IOEPL* action. *Broom*, 146 Ohio St. 3d at 72-73 (quoting *IOEPL (Hartman)*, 906 F. Supp. 2d 759, 791 (S.D. Ohio 2012)). It cited one *IOEPL* decision, for example, that provided a summary of six executions conducted between April 2012 and September 2013. *Id.* at 72 (citing *IOEPL*, 2013 WL 5963150, at *11-16 (S.D. Ohio Nov. 7, 2013)).

Indeed, Broom himself submitted voluminous exhibits to the state courts that provided information about Ohio’s post-Broom executions, primarily witness testimony and other exhibits from *IOEPL*. (*See Docs. 19-4 through 19-9*; Doc. 19-4 at 4-5 (index of

exhibits).) The Ohio Supreme Court found:

Here, there is no indication that further discovery or a hearing is required. Broom submitted an affidavit and other documentary exhibits, deposition testimony from participants at his attempted execution and other transcripts from the federal proceeding in *Cooey v. Strickland*, case No. 2:04-cv-1156, 2009 WL 4842393 (S.D. Ohio Dec. 7, 2009), and photographs of his puncture marks. There is no dispute as to any operative fact in connection with the events of September 14 and 15, 2009. Although he made a vague request in his postconviction petition for discovery and a hearing, a review of the docket shows that Broom never filed a discovery request while the matter was pending in the trial court. He also has failed to proffer what that additional discovery was or how a hearing would aid the trial court in resolving the legal questions before it. We agree with the court of appeals that the trial court based its decision on the undisputed and voluminous evidence it had and that the trial judge did not abuse his discretion in denying Broom's petition without additional discovery or an evidentiary hearing. There is no need for remand on this issue.

Broom, 146 Ohio St. 3d at 67. Broom, therefore, has not rebutted the *Harrington* presumption that the Ohio Supreme Court adjudicated his Eighth Amendment claim on the merits.

The Ohio courts evaluated the evidence presented and the parties' substantive arguments regarding the intrinsic rights and wrongs of Brooms' claims. *Williams*, 568 U.S. at 302. The decision of the last state court to review the claims, therefore, constitutes a disposition "on the merits" and is entitled to AEDPA deference under § 2254(d).¹⁰

II. First Claim for Relief: *Eighth Amendment Cruel and Unusual Punishment*

¹⁰ As explained above, Broom has filed a Motion for Evidentiary Hearing and/or To Expand the Record. (Doc. 31.) Because Broom's first claim (Eighth Amendment) and second claim (Double Jeopardy Clause) were adjudicated on the merits in state courts, the Motion is denied as to those claims. A federal habeas court's "review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits." *Pinholster*, 563 U.S. at 181. And, for that reason, federal evidentiary hearings also are not permissible for habeas claims adjudicated on the merits by a state court. *Id.* at 185. The Motion also is denied as to Broom's third claim (Ohio's post-conviction process) and fourth claim (due process) because, for reasons that follow, the third claim is not cognizable on habeas and the fourth claim is meritless.

For his first claim for relief, Broom argues that any further attempt to execute him, by any means or method, would violate the Eighth Amendment’s prohibition against cruel and unusual punishments. (Doc. 18 at 64-85.) As explained above, Broom raised this claim in state post-conviction proceedings, where it was adjudicated on the merits. *See Broom*, 2012 WL 504504, at *7-13; *Broom*, 146 Ohio St. 3d at 68-73. The claim, therefore, is preserved for federal habeas review.

A. Eighth Amendment Method-of-Execution Cases

The Eighth Amendment to the United States Constitution provides that “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. CONST. amend. VIII. The Supreme Court has “time and again reaffirmed that capital punishment is not *per se* unconstitutional.” *Glossip v. Gross*, 135 S. Ct. 2726, 2739 (2015); *see also Gregg v. Georgia*, 428 U.S. 153, 177 (1976). And, “[w]hile methods of execution have changed over the years, [the Court] has never invalidated a State’s chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment.” *Glossip*, 135 S. Ct. at 2732 (internal quotation marks and citation omitted).

The Supreme Court first considered whether particular methods of execution were cruel and unusual punishments in the late nineteenth century. In *Wilkerson v. Utah*, 99 U.S. 130 (1878), it upheld a sentence of death by firing squad. The Court compared the practice to executions in eighteenth-century England for various forms of treason, “where the prisoner was drawn or dragged to the place of execution, . . . embowelled alive, beheaded, and quartered, . . . [or] burn[ed] alive” *Id.* at 135. The Court declared it “safe to affirm that punishments of torture, . . . and all others in the same line of unnecessary cruelty, are forbidden” by the Eighth Amendment as they “superadded” pain

to the death sentence through “terror, pain, or disgrace.” *Id.* at 135-36. But the Court did not find the violence and pain associated with execution by firing squad unnecessarily cruel. *Id.* at 136.

Twelve years later, in *In re Kemmler*, 136 U.S. 436 (1890), the Court considered execution by electrocution. While it held that the Eighth Amendment did not apply to the states, *id.* at 447-49, the Court nonetheless explored the issue of what makes a punishment sufficiently “cruel” to fall under the Amendment’s proscription, opining:

Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the [C]onstitution. It implies there [is] something inhuman and barbarous, – something more than the mere extinguishment of life.

Id. at 447. The Court stressed that New York had adopted electrocution in order to replace hanging with “the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases.” *Id.* at 444 (internal quotation marks and citation omitted).

Most relevant here is the Court’s third method-of-execution case, *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), in which Louisiana sought to electrocute prisoner Willie Francis a second time after its initial attempt failed because the electric chair malfunctioned. An official witness to the failed attempt averred that after the executioner threw the switch, “Francis’ lips puffed out and he groaned and jumped so that the chair came off the floor. Apparently the switch was turned on twice” *Id.* at 480 n.2. Francis, who was strapped to the electric chair with a hood covering his eyes, then cried out, ““Take it off. Let me breath [*sic*].”” *Id.* The execution was stopped, and the Governor issued a reprieve. *Id.* at 460. The State later submitted evidence that no

electrical current reached Francis' body; his flesh did not show electrical burns; and Francis told a sheriff after leaving the chair that the electric current had "'tickled him.'" *Id.* at 480 n.2. Francis claimed that a second execution attempt would violate the Fifth Amendment's prohibition against double jeopardy and the Eighth Amendment's ban on cruel and unusual punishments. *Id.* at 461.

Resweber resulted in a splintered decision, in which five justices of the Court – a four-justice plurality and Justice Frankfurter in a concurring opinion – upheld a second execution attempt. *See id.* at 464 (plurality opinion); 471-72 (Frankfurter, J., concurring). In addressing the Eighth Amendment claim, the justices addressed two issues: (1) whether "unnecessary" pain was inflicted in either the failed execution attempt or the proposed execution, drawing on *Wilkinson* and *Kemmler*; and (2) whether the failed attempt was the result of an "unforeseeable accident" or was a "wanton infliction of pain."

Echoing *Kemmler*, the *Resweber* plurality first recognized:

The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. Prohibition against the wanton infliction of pain has come into our law from the Bill of Rights of 1688. The identical words appear in our Eighth Amendment. The Fourteenth would prohibit by its due process clause execution by a state in a cruel manner.

Id. (footnote omitted). It further explained, "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely." *Id.* at 464.

Assuming a violation of the Eighth Amendment's Cruel and Unusual Punishments Clause would violate the Fourteenth Amendment's Due Process Clause, *id.* at 462, the Justices found "nothing in what took place [in the execution attempt] which amounts to

cruel and unusual punishment in the constitutional sense.” *Id.* at 463.¹¹ And they found no “unnecessary pain involved in the proposed execution.” *Id.* at 464. The plurality rejected Francis’ argument that “because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment.” *Id.* “Even the fact that petitioner has already been subjected to a current of electricity,” they wrote, “does not make his subsequent execution any more cruel in the constitutional sense than any other execution.” *Id.*

In a concurring opinion, Justice Frankfurter concluded that the Eighth Amendment did not apply to the states. *Id.* at 469-70. But he found that allowing a second execution attempt would not violate the Due Process Clause as “repugnant to the conscience of mankind.” *Id.* at 471-72 (internal parenthesis and quotation marks omitted).

In addition, the plurality and Justice Frankfurter both emphasized that Francis’ execution failed because of an accident, which the state officials neither maliciously intended nor foresaw. The plurality began its analysis in the case by observing,

As nothing has been brought to our attention to suggest the contrary, we must and do assume that the state officials carried out their duties under the death warrant in a careful and humane manner. Accidents happen for which no man is to blame.

Id. at 462. The Justices determined that even when an inmate experiences additional pain due to a failed execution attempt, if the impediment to the execution was “an accident, with no suggestion of malevolence,” it does not violate the Eighth Amendment. *Id.* at 463.

They explained,

¹¹ Fifteen years later, the Supreme Court cited *Resweber* alone as support in holding that the Eighth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 666 (1962).

The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution.

Id. at 464. The plurality found the situation “just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block.” *Id.*

Justice Frankfurter agreed, concluding that allowing a second execution attempt after the “innocent misadventure” of the failed attempt did not rise to the level of a due process violation. *Id.* at 470. He cautioned, however, that “a series of abortive attempts at electrocution or even a single, cruelly willful attempt” would present a different case. *Id.* at 471.

The plurality and Justice Frankfurter agreed, therefore, that a second execution attempt is not a cruel and unusual punishment where the initial attempt failed because of an accident and “[t]here [was] no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution.” *Id.* at 464, 470-71.

The Supreme Court did not review a method of execution again until it recently affirmed the constitutionality of execution by lethal injection in *Glossip v. Gross*, 135 S. Ct. 2726 (2015), and *Baze v. Rees*, 553 U.S. 35 (2008). In *Glossip*, the Court adopted the test for facial method-of-execution challenges established by the controlling opinion in the fractured *Baze* decision: namely, that prisoners must demonstrate that the method presents a substantial risk of severe pain and there is a readily available alternative procedure. *Glossip*, 135 S. Ct. at 2737 (citing *Baze*, 553 U.S. at 50-52).

The Court noted in both *Glossip* and *Baze* that states have adopted lethal injection

as a “more humane way to carry out death sentences.” *Id.* at 2732; *see also Baze*, 553 U.S. at 43 n.1. Nevertheless, it emphasized at the outset of both opinions, “[s]ome risk of pain is inherent in any method of execution – no matter how humane – if only from the prospect of error in following the required procedure. . . . [T]he Constitution does not demand the avoidance of all risk of pain in carrying out executions.” *Baze*, 553 U.S. at 47; *see also Glossip*, 135 S. Ct. at 2733. The Court added in *Glossip*, “After all, while most humans wish to die a painless death, many do not have that good fortune. Holding that the Eighth Amendment demands the elimination of essentially all risk of pain would effectively outlaw the death penalty altogether.” *Glossip*, 135 S. Ct. at 2733.

A majority of the Court in *Baze* relied on *Resweber* to establish this central principle. The plaintiffs in *Baze* did not claim that the proper administration of Kentucky’s lethal-injection protocol would constitute “cruel or wanton infliction of pain.” *Baze*, 553 U.S. at 49. Rather, they argued that there was a significant risk that the procedures would not be properly followed, resulting in severe pain. *Id.* The three-justice lead opinion recognized that it has held “that subjecting individuals to a risk of future harm – not simply actually inflicting pain – can qualify as cruel and unusual punishment” in cases regarding prison conditions. *Id.* at 49-50. The Justices noted that prisoners must show a “substantial risk of serious harm” and “objectively intolerable risk of harm” to challenge conditions of confinement under the Eighth Amendment. *Id.* at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846, and n.9 (1994)). They then relied on *Resweber* to demonstrate the limits of this Eighth Amendment protection from the risk of future harm in method-of-execution cases. *Id.* “Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death,” they pronounced, “does not establish

the sort of ‘objectively intolerable risk of harm’ that qualifies as cruel and unusual.” *Id.*¹²

Justice Thomas, in a concurring opinion joined by Justice Scalia, cited *Resweber*, along with *Wilkerson* and *Kemmler*, to refute the lead opinion’s test with its emphasis on risk and alternative methods. *See id.* at 99-103. In his view, “[t]he evil the Eighth Amendment targets is intentional infliction of gratuitous pain, and that is the standard our method-of-execution cases have explicitly or implicitly invoked.” *Id.* at 102. He noted that in *Resweber*, “the Court was confronted in dramatic fashion with the reality that the electric chair involved risks of error or malfunction that could result in excruciating pain.” *Id.* at 103. “But absent ‘malevolence’ or a ‘purpose to inflict unnecessary pain,’” he wrote, “the Court concluded that the Constitution did not prohibit Louisiana from subjecting the petitioner to those very risks a second time in order to carry out his death sentence.” *Id.* (quoting *Resweber*, 329 U.S. at 463, 464 (plurality opinion); 471 (Frankfurter, J., concurring)). “No one suggested that Louisiana was required to implement additional safeguards or alternative procedures in order to reduce the risk of a second malfunction. And it was the *dissenters* in *Resweber* who insisted that the absence of an intent to inflict pain was irrelevant[,]” he observed. *Id.* (emphasis in original) (citing *Resweber*, 329 U.S. at 477 (Burton, J., dissenting) (“The intent of the executioner cannot lessen the torture or excuse the result.”)).

¹² The Court had similarly relied on *Resweber* in conditions-of-confinement cases to demonstrate the boundaries of Eighth Amendment protections. *See, e.g., Estelle v. Gamble*, 429 U.S. 97, 103, 105 (1976) (citing *Resweber* to support the proposition that “[a]n accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain”); *Glass v. Louisiana*, 471 U.S. 1080, 1085 (1985) (citing *Resweber* to support the proposition that “[a] single, unforeseeable accident in carrying out an execution does not establish that the method of execution itself is unconstitutional”).

The lead opinion in *Baze* also appears to have affirmed *Resweber*'s cruel-intent requirement. The Justices noted the *Resweber* plurality's characterization of the failed execution attempt as "an accident, with no suggestion of malevolence," and Justice Frankfurter's comparison of the "innocent misadventure" at issue in that case to a hypothetical "series of abortive attempts." *Id.* at 50 (quoting *Resweber*, 329 U.S. at 463, 464 (plurality opinion); *id.* at 471 (Frankfurter, J., concurring)). They then concluded that "an isolated mishap alone does not give rise to an Eighth Amendment violation, precisely because such an event, while regrettable, does not suggest cruelty, or that the procedure at issue gives rise to a 'substantial risk of serious harm.'" *Id.* (quoting *Farmer*, 511 U.S. at 842). *See also* John Stinneford, *The Original Meaning of "Cruel"*, 105 Geo. L. J. 441, 451-53 (2016) (positing that when *Baze* and *Glossip* were decided, a majority of the Court "expressed sympathy" with the view that a method of execution can only be considered cruel if it is purposely designed to inflict unnecessary pain).¹³

B. Ohio Supreme Court Decision

The Ohio Supreme Court was the last state court to address Broom's Eighth Amendment claim. After summarizing the applicable federal law, the court reasoned:

¹³ The Court also recognized *Resweber*'s cruel-intent requirement in establishing the requisite culpable state of mind – "deliberate indifference" – for Eighth Amendment claims regarding conditions of confinement. *See Estelle v. Gamble*, 429 U.S. 97, 105 (1976) (relying on *Resweber* to demonstrate that "[a]n accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain"); *Wilson v. Seiter*, 501 U.S. 294, 297-98 (1991) (noting that *Resweber* plurality "emphasized that the Eighth Amendment prohibited 'the wanton infliction of pain[.]' . . . Because the first attempt had been thwarted by an 'unforeseeable accident,' the officials lacked the culpable state of mind necessary for the punishment to be regarded as 'cruel,' regardless of the actual suffering inflicted") (emphasis in original; internal citations omitted). *See also Whitley v. Albers*, 475 U.S. 312, 320-21 (1992) (holding that prisoners must show prison officials acted "maliciously and sadistically for the very purpose of causing harm" to establish Eighth Amendment claims of excessive force).

Broom's actual sentence of death is not at issue, nor does this case concern Ohio's chosen method of execution. Instead, Broom asserts that a second execution attempt would constitute cruel and unusual punishment. He claims that what he already experienced went beyond the time, pain, and emotional anguish involved in a "normal" execution. Because there is no guarantee of success, Broom contends, any further attempt to execute him would be cruel and unusual.

Broom's claim has no precedent in Ohio. The United States Supreme Court, however, considered whether a failed execution attempt violated the Eighth Amendment in *Resweber*. After the mechanical difficulty with the electric chair failed to result in Francis's death, a new death warrant was issued. *Id.*, 329 U.S. at 460, 67 S.Ct. 374, 91 L.Ed. 422. Francis objected and argued that once he underwent "the psychological strain of preparation for electrocution," to require him to undergo the preparation a second time would subject him to lingering or cruel and unusual punishment. *Id.* at 464, 67 S.Ct. 374. A four-member plurality rejected this argument, because "[t]he cruelty against which the Constitution protects a convicted man is cruelty inherent in the *method of punishment*, not the necessary suffering involved in any method employed to extinguish life humanely." (Emphasis added.) *Id.* at 464, 67 S.Ct. 374.

The dissenting justices noted that electrocution is statutorily and constitutionally permissible only if it is "so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death itself." *Id.* at 474, 67 S.Ct. 374 (Burton, J., dissenting). The dissenters rejected the prospect of execution by installments, what they termed "a delayed process of execution." *Id.* at 474–475, 67 S.Ct. 374.

Justice Frankfurter cast the deciding vote. He joined the plurality to reject Francis's appeal because he did not believe that the Fourteenth Amendment made the Bill of Rights applicable to the states. FN1. According to Justice Frankfurter, the Due Process Clause of the Fourteenth Amendment limited a state's criminal procedures only insofar as a state practice " 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " *Id.* at 469, 67 S.Ct. 374 (Frankfurter, J., concurring), quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed. 674 (1934). Justice Frankfurter did not believe that Louisiana's treatment of Francis rose to that level. As a result, Willie Francis went to the electric chair a second time.

FN 1. The United States Supreme Court later repudiated Frankfurter's position: The Due Process Clause of the Fourteenth Amendment does incorporate the Eighth Amendment's protections against cruel and unusual punishments to apply to the states. *Robinson v. California*, 370 U.S. 660, 666–667, 82 S.Ct.

1417, 8 L.Ed.2d 758 (1962).

Based on *Resweber*, we determine, as did the Eighth District, that there is no per se prohibition against a second execution attempt based on the Cruel and Unusual Punishments Clause of the Eighth Amendment. The state's intention in carrying out the execution is not to cause unnecessary physical pain or psychological harm, and the pain and emotional trauma Broom already experienced do not equate with the type of torture prohibited by the Eighth Amendment.

Having determined that allowing the state to go forward with Broom's execution does not amount to a per se violation of the Eighth Amendment, we consider whether it is violated under the test set forth in *Glossip* and *Baze*. Broom argues that the state should have known of the potential problems with his execution beforehand. He submitted evidence that the state experienced problems establishing and maintaining IV catheters during the previous executions of Joseph Clark and Christopher Newton and that problems should have been expected when Broom's first vein assessment indicated that there may be trouble accessing the veins. But, it is unclear from the record why Broom's execution team was unable to establish IV access. Although Dr. Heath suggested that it was poor technique, it is Broom's burden to establish that he is likely to suffer severe pain if required to undergo a second execution.

Further, in December 2009, less than three months after the attempt to execute Broom, the Sixth Circuit rejected a constitutional challenge to Ohio's execution protocol, noting that “[s]peculations, or even proof, of medical negligence in the past or in the future are not sufficient to render a facially constitutionally sound protocol unconstitutional.” *Cooley*, 589 F.3d at 225. The protocol that the Sixth Circuit reviewed in *Cooley* has been amended and we cannot assume that the same problems with IV access will befall Broom again.

Broom also contends that the state's violation of the execution protocols indicates that prison officials were not blameless and created a substantial risk of harm. We agree that compliance with execution protocols is the best way to avoid the risk of severe pain, but deviation from a protocol is not an automatic constitutional violation. *See In re Ohio Execution Protocol Litigation (Wiles)*, 868 F.Supp.2d 625, 626 (S.D. Ohio 2012) (protections of the United States Constitution “do not require perfect adherence to every single provision of Ohio's execution protocol without deviation”). We are not convinced, however, that Broom has established that the state is likely to violate its execution protocol in the future.

Following the events of September 15, 2009, the state was enjoined from carrying out the executions of Kenneth Smith and Charles Lorraine based in large part on the federal district court's determination that Ohio was not

following its execution protocol. *See Cooley v. Kasich*, 801 F.Supp.2d 623 (S.D. Ohio 2011); *In re Ohio Execution Protocol Litigation (Lorraine)*, 840 F.Supp.2d 1044 (S.D. Ohio 2012).

The state sought to address the concerns of the federal district court. It amended the protocol, adding a new command structure and forms that were required to be filled out as each step of the protocol was completed to ensure compliance. *Wiles* at 629–632. The state sufficiently demonstrated a commitment to follow the protocol and was allowed to proceed with the execution of Mark Wiles. *Id.* at 652. Several more executions occurred without any apparent violation of the protocol. *In re Ohio Execution Protocol Litigation (Phillips)*, S.D. Ohio No. 2:11-cv-1016, 2013 WL 5963150, *11–16 (Nov. 7, 2013). This led the district court to conclude that “ ‘Ohio does not have a perfect execution system, but it has a constitutional system that it appears to be following.’ ” *Id.*, quoting *In re Ohio Execution Protocol Litigation (Hartman)*, 906 F.Supp.2d 759, 791 (S.D. Ohio 2012).

While we acknowledge that the state failed to follow the protocol in 2009, we cannot ignore what has transpired since then. The state has executed 21 death-row inmates since the attempted execution of Broom. *See* Ohio Department of Rehabilitation and Correction, *Ohio Executions—1999 to Present*, <http://www.drc.ohio.gov/web/executed/executed25.htm> (last updated Jan. 16, 2014).

To be clear, the state must comply with the protocol as amended. Strict compliance with the protocol will ensure that executions are carried out in a constitutional manner and can also prevent or reveal an inmate's attempt to interfere with the execution process. FN2. We simply are unable to conclude that Broom has established that the state in carrying out a second attempt is likely to violate its protocol and cause severe pain.

FN 2. At oral argument, the state speculated that Broom himself caused the difficulty in accessing his veins by taking antihistamines to dehydrate himself. There was also a reference in the official timeline of Broom's execution that the “[m]edical team [was] having [a] problem maintaining an open vein due to past drug use.” However, there is no evidence in the record supporting either allegation. We mention these allegations only to illustrate that following the current execution protocol could reveal potential problems with IV access. For instance, the protocol requires four vein checks and a review of the inmate's medical chart, which may include information regarding prior drug use. Ohio Department of Rehabilitation and Correction, *Policy No. 01-COM-11*, at 6, 9, 11, http://www.drc.ohio.gov/web/drc_policies/documents/01-COM-11.pdf (accessed Jan. 25, 2016). Also, after transfer to the Death House, the inmate is

to be constantly monitored by at least three members of the execution team who are required to maintain an execution timeline. *Id.* at 2 and 9. The execution timeline is supposed to record certain specified events, such as the vein checks and other information at the discretion of the execution team. *Id.* at 2. And certainly, the ingestion of antihistamines should be a noteworthy event.

We therefore conclude that the Eighth Amendment does not bar the state from carrying out Broom's execution.

Broom, 146 Ohio St. 3d at 70-73.

C. Analysis

Broom argues that the Ohio Supreme Court's decision rejecting his Eighth Amendment claim "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States[.]" 28 U.S.C. § 2254(d)(1).¹⁴ (*See* Doc. 18 at 68.)

1. Clearly Established Supreme Court Precedent

The "threshold question" under § 2254(d)(1) is what "clearly established" Supreme Court precedent governs Broom's Eighth Amendment second-attempt claim. *Williams v. Taylor*, 529 U.S. 362, 390 (2000). As noted above, "clearly established Federal Law" in § 2254(d)(1) "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." *Id.* at 412; *see also Thaler v.*

¹⁴ Broom also claims the Ohio Supreme Court's decision "was based on an unreasonable determination of the facts in light of the evidence presented" under § 2254(d)(2). (Doc. 18 at 68.) As Respondent points out, however (Doc. 21 at 41), Broom does not dispute any specific factual finding of the state court. (*See* Doc. 30 at 39 ("[T]o the extent that the Ohio Supreme Court determined the facts in such a way that Broom was not entitled to relief . . . [,] the state court's decision is based upon an unreasonable determination of the facts in light of the evidence presented.")) And the Ohio Supreme Court observed, "There is no dispute as to any operative fact in connection with the events of September 14 and 15, 2009." *Broom*, 146 Ohio St. 3d at 67. This Court, therefore, will not address that aspect of Broom's Eighth Amendment claim.

Haynes, 559 U.S. 43, 47 (2010) (per curiam) (“A legal principle is ‘clearly established’ within the meaning of [§ 2254(d)(1)] only when it is embodied in a holding of th[e] [Supreme] Court.”).

The Supreme Court recently has articulated a restrictive view of what constitutes clearly established law for purposes of § 2254(d)(1). *See generally House v. Hatch*, 527 F.3d 1010, 1015-17 (10th Cir. 2008). In *Carey v. Musladin*, 549 U.S. 70 (2006), it clarified that “clearly established Federal law” consists of “Supreme Court holdings in cases where the facts are at least closely-related or similar to the case *sub judice*. Although the legal rule at issue need not have had its genesis in the closely-related or similar factual context, the Supreme Court must have expressly extended the legal rule to that context.” *Id.* at 1017. “In conducting the ‘clearly established’ inquiry,” therefore, “lower courts must narrowly construe Supreme Court precedents and, as a consequence, ‘clearly established’ law ‘consist[s] only of something akin to on-point holdings.’” *Pouncy v. Palmer*, 846 F.3d 144, 161 (6th Cir. 2017) (quoting *House*, 527 F.3d at 1015). In *Wright v. Van Patten*, 552 U.S. 120 (2008), for example, the Court reversed a grant of habeas relief because no Supreme Court decision had “squarely address[ed]” the issue or “clearly establish[ed]” that law developed in a different context applied to the facts of that case. *Id.* at 125.

Broom argues that the Ohio Supreme Court should not have relied on *Resweber* as the clearly established law governing his Eighth Amendment claim. He first contends the decision is “archaic” and has been eclipsed by the Court’s “modern Eighth Amendment standards,” clearly established in cases such as *Trop v. Dulles*, 356 U.S. 86 (1958). (Doc. 18 at 68-71; Doc. 30 at 36-39). He refers to Chief Justice Warren’s often-cited

pronouncement in *Trop*, a condition-of-confinement case, that “[t]he [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” *Trop*, 356 U.S. at 101. *Trop* also established the fundamental Eighth Amendment principle that “[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man.” *Id.* at 100. Respondent counters that the Ohio Supreme Court correctly identified *Resweber* as controlling precedent, as it is the only United States Supreme Court case to address an Eighth Amendment challenge to a second execution attempt, albeit by a different mechanism; electrocution. (*See* Doc. 21 at 36-39.)

The Court agrees with Respondent. Although *Resweber* was decided more than seventy years ago, it still “squarely addresses” the issue in this case: whether a second execution attempt is a cruel and unusual punishment under the Eighth Amendment. *Van Patten*, 552 U.S. at 125. The decision remains good law; the Supreme Court has never overruled it or, to this Court’s knowledge, even questioned it.

Indeed, the Supreme Court’s treatment of *Resweber* leaves little doubt that the decision remains a viable and significant precedent, despite its age and fractured composition. The Court consistently has cited *Resweber* as one of its landmark Eighth Amendment cases. *See, e.g., Furman v. Georgia*, 408 U.S. 238, 326, 393 n.17, 423 (1976); *Gregg v. Georgia*, 428 U.S. 153, 170-171, 178 (1976); *Estelle v. Gamble*, 429 U.S. 97, 104 (1976); *Glass v. Louisiana*, 471 U.S. 1080, 1085 (1985); *Baze v. Rees*, 553 U.S. 35, 50, 61, 103 (2008); *Glossip v. Gross*, 135 S. Ct. 2726, 2732 (2015). Most notably, as discussed above, the Court relied on *Resweber* to buttress a key principle underlying its two most recent method-of-execution cases, *Baze v. Rees* and *Glossip v. Gross*: that an execution

method is not cruel and unusual “[s]imply because [it] may result in pain, either by accident or as an inescapable consequence of death” *Baze*, 553 U.S. at 50; *see also Glossip*, 135 S. Ct. at 2733.

Trop’s “evolving standard of decency” and “dignity of man” principles, on the other hand, are “far too abstract to establish clearly the specific rule” governing Broom’s claim. *Lopez v. Smith*, 135 S. Ct. 1, 4 (2014). In determining what is “clearly established” Supreme Court precedent, courts may not “refine or sharpen a general principle of Supreme Court jurisprudence into a specific legal rule” not announced by the Supreme Court. *Id.* (quoting *Marshall v. Rodgers*, 569 U.S. 58, 64 (2013)); *see also House*, 527 F.3d at 1016 n.5 (habeas courts may not “extract clearly established law from the general legal principles developed in factually distinct contexts.”). *Trop*’s principles, however fundamental to Eighth Amendment jurisprudence, do not address “the specific question presented by this case” and cannot be used to guide habeas courts in reviewing a state-court decision under § 2254(d)(1). *Smith*, 135 S. Ct. at 4.

Broom also argues that *Resweber* cannot constitute clearly established law for purposes of § 2254(d)(1) because it is a plurality decision in which a majority of justices agreed only that the Eighth Amendment does not apply to the states. (Doc. 30 at 35-36.) He cites as support *Marks v. United States*, 430 U.S. 188 (1977), which holds, “When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” *Id.* at 193 (quotation marks and editorial marks omitted); *see also Panetti v. Quarterman*, 551 U.S.

930, 948-49 (2007) (applying *Marks* to a splintered decision of the Court and concluding that the narrowest rule “constitutes clearly established law for purposes of § 2254.”) (Internal quotation marks omitted).

It is true that Justice Frankfurter opined that the Eighth Amendment did not apply to the states. *Resweber*, 329 U.S. at 469. But the *Resweber* plurality did not. Although, as Broom points out, the plurality cited in a footnote several earlier cases in which the Court had declined to incorporate the Fifth and Eighth Amendments, *see id.* at 462 n.2, it expressly stated that it would review Francis’ claims “under the assumption, *but without so deciding*,” the incorporation issue. *Id.* at 462 (emphasis added). Five justices, therefore, did not agree in *Resweber* that the Eighth Amendment did not apply to the states and that is not the case’s holding under *Marks*.¹⁵

As explained above, however, five justices did agree in *Resweber* that a second execution attempt was not unconstitutional because the initial attempt was impeded by an accident and the state did not intend to inflict unnecessary pain in the failed attempt or in the proposed execution. *Id.* at 464, 471. Justice Marshall recognized this holding in his concurring opinion in *Furman v. Georgia*, *supra*. He wrote that in *Resweber*, “[f]ive members of the Court . . . held that the legislature adopted electrocution for a humane purpose, and that its will should not be thwarted because, in its desire to reduce pain and suffering in most cases, it may have inadvertently increased suffering in one particular

¹⁵ In fact, as noted above, the Supreme Court cited *Resweber* alone as support for its later holding that the Eighth Amendment applies to the states through the Due Process Clause of the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660, 666 (1962).

case.” *Furman*, 408 U.S. at 326 (Marshall, J., concurring).¹⁶ Justice Marshall specifically discounted the fact that Justice Frankfurter applied the Fourteenth Amendment’s Due Process Clause rather than the Eighth Amendment’s Cruel and Unusual Punishments Clause to Francis’ second-attempt claim, concluding that “in substance, his test was fundamentally identical to that used by the rest of the Court.” *Id.* at 326 n.28. Justice Powell also observed in dissent that “it seems clear that the tests for applying the [two clauses] are fundamentally identical.” *Id.* at 422 n.4 (Powell, J., dissenting). *See also Gregg*, 428 U.S. at 170-71 (describing *Resweber*’s holding as “second attempt at electrocution found not to violate Eighth Amendment, since failure of initial execution was ‘an unforeseeable accident’ and ‘[t]here was no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution.’”) (Editing marks and citation omitted).

Resweber is a viable and important Supreme Court decision that is directly on point. It is therefore the clearly established law controlling Broom’s Eighth Amendment claim for purposes of this Court’s review under § 2254(d)(1).¹⁷

2. State Court’s Application of *Resweber*

Broom contends that even if *Resweber* is the clearly established law governing his

¹⁶ Justice Marshall added in a footnote that English law required a second attempt at execution if the first attempt failed. *Furman*, 408 U.S. at 326 n.30 (citing L. Radzinowicz, A History of English Criminal Law 185-86 (1948)).

¹⁷ Of course, as Respondent argues (Doc. 21 at 39), because *Resweber* is the only Supreme Court case that squarely addresses Broom’s Eighth Amendment claim, if it did not “clearly establish” law controlling this claim – whether because of its age or plurality composition – then there is no governing federal law and habeas relief is barred by § 2254(d). *See Smith*, 135 S. Ct. at 4.

Eighth Amendment claim, the Ohio Supreme Court unreasonably applied it. The state court made quick work of *Resweber* in analyzing Broom's claim. It first determined that, based on *Resweber*, there was no "per se prohibition" against Ohio attempting to execute Broom a second time. *Broom*, 146 Ohio St. 3d at 71. The court then observed, "The state's intention in carrying out the execution is not to cause unnecessary physical pain or psychological harm, and the pain and emotional trauma Broom already experienced do not equate with the type of torture prohibited by the Eighth Amendment." *Id.*

The state court next considered Broom's claim under the first prong of the *Baze/Glossip* test – namely, whether a second execution attempt presents a substantial risk of serious harm – and found it did not.¹⁸ *Id.* at 71-73. In doing so, it addressed two arguments posed by Broom: (1) "the state should have known of the potential problems with [Broom's] execution beforehand," *id.* at 71; and (2) "the state's violation of the execution protocols indicates that prison officials were not blameless and created a substantial risk of harm," *id.* at 72. These issues mirror *Resweber*'s examination of whether: (1) the execution attempt was unsuccessful because of an unforeseeable accident; and (2) there was unnecessary pain inflicted in the initial execution attempt and a risk of

¹⁸ The Ohio Supreme Court applied only the first prong of the *Baze/Glossip* test because the second prong, requiring an available alternative method, does not apply to Broom's claim. As the state court acknowledged, Broom did not challenge Ohio's lethal-injection method of execution on its face. *See id.* at 70 ("nor does this case concern Ohio's chosen method of execution"). Similarly, here, he seeks to bar Ohio from attempting to execute him again "by any means or methods, including any adopted after the State's failed attempt[.]" (*See, e.g.,* Doc. 18 at 47 n.5.)

unnecessary pain in the proposed execution.¹⁹

The failed execution attempt: “unforeseeable accident” or “wanton infliction of pain.” The Ohio Supreme Court found that the State did not intend to cause harm in the execution attempt and it rejected Broom’s argument that the State should have foreseen the problems with accessing Broom’s veins because it had encountered similar difficulties in previous executions and Broom’s first vein assessment indicated “that there may be trouble accessing the veins.” *Broom*, 146 Ohio St. 3d at 71-72. The state court noted that Broom’s expert, Dr. Mark Heath, attributed the execution team’s inability to obtain IV access to the team’s medical incompetence, but the court found the cause of the problems “unclear.” *Id.* at 72; *see also id.* at 73 n.2 (noting State’s allegations at oral argument that Broom himself may have been to blame by taking antihistamines to dehydrate himself and a reference in the official timeline of Broom’s execution to difficulties with Broom’s veins because of his past drug use, but acknowledging that there was no evidence in the record to support either allegation).

Here, Broom asserts that, unlike the electric chair’s mechanical malfunction in *Resweber*, his failed execution was not the result of an “unforeseeable accident.” As he argued in state court, he claims the State’s inability to access a vein was foreseeable because similar problems had occurred in prior executions and the execution team knew

¹⁹ Broom argues the state court misapplied *Baze* and *Glossip* to his second-attempt claim, as those cases concerned facial attacks on methods of execution. (Doc. 18 at 83.) A habeas court, however, need only determine whether the state court’s reasoning and the result are consistent with the controlling clearly established Supreme Court precedent. *Early v. Packer*, 537 U.S. 3, 8 (2002) (per curiam). Because the state court’s *Baze/Glossip* analysis addressed issues that are also relevant under *Resweber*, the court’s application of *Baze* and *Glossip* was consistent with *Resweber*.

Broom's veins were at least partially compromised before the procedure. Yet, rather than act in a "careful and humane manner" in carrying out Broom's execution, the State officials and execution team deviated from Ohio's lethal-injection protocol in numerous respects, most notably, in IV training and pre-execution vein checks. (Doc. 18 at 74-75.)

It is undisputed that Ohio had difficulties with IV access in executions conducted before Broom's. Ohio Supreme Court Justice French wrote in dissent:

The Broom execution attempt was not the first time the medical execution team had difficulty inserting an IV catheter. During Ohio's very first lethal injection, that of Wilford Berry in 1999, the medical team members responsible for the IV catheter line were unable to locate a vein in Berry's arm and had to call a third team member for assistance. When the state executed Christopher Newton in 2007, the medical team needed approximately 90 minutes to establish two IV lines. And during the 2009 execution of Marvallous Keene, the team had to switch to a backup line because they could not get fluid to flow.

But the most disastrous execution prior to the attempted execution of Broom was that of Joseph Clark on May 2, 2006. Based on the end-of-the-day needle count in Clark's case, the execution team used 17 or 18 needles trying to establish two IV lines and never did manage to install the backup line before ultimately executing him. As in Broom's case, Dr. Heath was critical of the decision in Clark's case to continue fruitlessly trying to establish the IV, testifying that he would not subject a patient to more than six to ten attempts, because "any normal practitioner" will recognize by that point that the effort is futile and is only inflicting needless pain on the patient.

Broom, 146 Ohio St. 3d at 77 (French, J., dissenting).²⁰

The Ohio Supreme Court also acknowledged that Ohio failed to follow its protocol during the Broom execution attempt. *Id.* at 73.²¹ The record shows that prison officials

²⁰ These facts are not in dispute. The Ohio Supreme Court stated, "There is no dispute as to any operative fact in connection with the events of September 14 and 15, 2009." *Broom*, 146 Ohio St. 3d at 67.

²¹ Ohio first began using lethal injection as a means of execution in 1993, and it became Ohio's sole method of execution in 2001. *See Cooney v. Strickland*, 479 F.3d 412, 416 (6th Cir. 2007). Ohio specified lethal injection by statute, but its protocol (referring to its policies,

permitted execution team members to miss required training sessions before his execution. (Doc. 19-7 at 221-22 (Kerns Depo.)) There was no backup plan in the event IV access could not be obtained or maintained. (*Id.* at 32 (Collins Depo.)) And there was no record in the execution timeline that a third required vein check was performed the day of the execution. (*See* Doc. 19-9 at 89-94 (Execution Timeline).)

Justice French provided this summary of Dr. Heath's testimony at an *IEOPL* hearing in which he criticized the execution team's performance at Broom's execution attempt:

As Dr. Heath explained, execution drugs are administered through a peripheral IV catheter, which consists of a hollow needle surrounded by a plastic tube called the catheter. The practitioner inserts both the needle and the catheter into the vein. Thus, although blood draws and IV catheters both involve needle pricks, the latter also includes the insertion of an object with a wider diameter.

Dr. Heath testified that in Broom's case, the medical team inserted the catheters improperly and in a fashion likely to cause greater pain:

And what [Broom] described did not sound right to me at all in terms of proper procedure. He described the depth into his muscle which they were pushing the catheter, going all the way up to the hub of the catheter, which is well over an inch deep, and going in at a very steep angle, which does not comport with proper technique or what's going to be a successful technique for getting a catheter into a vein.

Q: And what kind of—what kind of response would a human body have to that kind of technique?

A: It would hurt.

practices and procedures) for administering lethal injection is not established by statute, administrative rule, or regulation. *Id.* at 426. *See* Ohio Rev. Code § 2949.22; DRC Policy 01-COM-11. The promulgation and implementation of Ohio's lethal-injection protocol, therefore, "is solely within the discretion of the ODRC, which "can change the protocol at any time, regardless of whether an inmate is scheduled for execution." *Cooley*, 479 F.3d at 426. And Ohio has done just that on numerous occasions. *See Cooley v. Strickland*, 588 F.3d 924, 927 (6th Cir. 2009).

The fact that the medical team attempted to insert the catheter into Broom's arm in a nearly perpendicular line “bespeaks of bizarre and certainly poor technique” that had “no possibility of achieving insertion.” Even the Lucasville physician inserted the catheter into Broom's ankle at the wrong angle, which is why she struck bone.

On two occasions, after getting the catheter into Broom's veins, team members “botched up that relatively simple process of attaching the I.V. tubing into the hub of the catheter, and blood sprayed everywhere.” Compounding the problem, the team member who inserted the catheter was not wearing gloves during the procedure, thereby increasing the risk of unsuccessfully attaching the tubing.

Dr. Heath testified that clinical competence demands that attempts at peripheral IV access be abandoned long before the 19th attempt. The Lucasville physician agreed with this assessment, testifying that if she had known that 18 attempts had already been made on Broom, she never would have stuck him with a needle. And although it can be proper practice to “fish” a vein—partially withdrawing a catheter, then reinserting it at a different angle—it was “completely unacceptable [and] far beyond any acceptable standard” to have made as many insertion attempts through the same needle holes as the medical team apparently did.

* * *

Dr. Heath offered a simple explanation for the state's failures: incompetence. “[I]t is my opinion that the veins on Mr. Broom's arms, other areas of his body, should be easily accessible by a competent team.” Part of the problem, he opined, arose from the fact that Ohio had lax standards regarding who may install a peripheral IV catheter during an execution. The person inserting the peripheral IV catheter should be someone who performs that task as part of his or her daily job duties. But Ohio's protocol required only one year of experience, with no limitation on how remote in time that experience might be.

Team Member 9, who participated in the Broom procedure, is a phlebotomist. But drawing blood, which is what phlebotomists do, is a “much easier and simpler” process that is “far less fraught with problems” than inserting a catheter in order to inject drugs into the body. Dr. Heath testified that allowing a phlebotomist such as Member 9 to handle the insertion at an execution is “deeply inappropriate and reflects a deep misunderstanding and deep inability of what is needed to assemble an appropriate [execution] team.”

Broom, 146 Ohio St. 3d at 76-78 (French, J., dissenting).

But these circumstances, however troubling in hindsight, did not render the failed

execution attempt reasonably foreseeable. “The test of foreseeability is that which is objectively reasonable to expect, not merely what might conceivably occur. Harm that is merely possible is not necessarily reasonably foreseeable.” 57A AM. JUR. 2d *Negligence* § 124 (2018).

The fact that the execution team had difficulties in prior executions does not show that state officials expected or reasonably should have expected those problems to reoccur at Broom’s execution. As the Ohio Supreme Court noted, the Sixth Circuit has rejected this argument in upholding Ohio’s lethal-injection protocol, finding that “[s]peculations, or even proof, of medical negligence in the past or in the future are not sufficient to render a facially constitutionally sound protocol unconstitutional.” *Broom*, 146 Ohio St. 3d at 72 (quoting *Cooley II v. Strickland*, 589 F.3d 210, 225 (6th Cir. 2009)). “Permitting constitutional challenges to lethal injection protocols based on speculative injuries and the possibility of negligent administration,” the circuit court continued, “is not only unsupported by Supreme Court precedent but is also beyond the scope of our judicial authority.” *Cooley II*, 589 F.3d at 225 (citing *Gregg*, 428 U.S. at 174-75).

In fact, as Broom acknowledges (*see* Doc. 18 at 52, 74), in May 2009, after the Clark execution and before the Broom execution attempt, Ohio revised its written execution protocol to address problems with establishing and maintaining IV lines, adding training requirements and vein checks. *See Cooley v. Strickland*, 610 F. Supp. 2d 853, 926 (S.D. Ohio 2009). It stated:

Every possible effort shall be made to anticipate and plan for foreseeable difficulties in establishing and maintaining the intravenous (IV) lines. The condemned prisoner shall be evaluated by appropriately trained medical staff on the day of arrival at the institution, to evaluate the prisoner’s veins and plan for the insertion of the IV lines. This evaluation shall include a “hands-on”

examination as well as a review of the medical chart, to establish any unique factors which may impact the manner in which the execution team carries out the execution. At a minimum, the inmate shall be evaluated upon arrival, later that evening at a time to be determined by the warden, and on the following morning prior to nine a.m. Potential problems shall be noted and discussed, and potential solutions considered, in advance of the execution.

(Doc. 19-10 at 360 (May 2009 Execution Protocol).) The protocol also required that every team member be trained in “the insertion of the IV needles” and “signs of IV incontinence . . .” (*Id.* at 358.) Broom does not point to any evidence that State officials or the execution team expected or should have expected that these measures would not be followed.

Nor does the record support Broom’s argument that State or prison officials, including the execution team members, expected or reasonably should have expected to have problems with IV access based on observations of Broom’s veins. As the Ohio Supreme Court noted, at Broom’s first required vein check the day before the execution attempt, the nurse and phlebotomist who assessed Broom’s veins recorded in the execution timeline that the veins of his left arm were “not as visible or palpable” as those of his right arm. (Doc. 19-9 at 96 (Execution Timeline).) This means they found “accessible” veins on his right arm and had reason to believe they could access those veins. The required second vein check was performed that evening and noted in the timeline, but no specific observations were recorded. (*Id.* at 95.) There was no mention in the timeline of a third vein assessment, which the protocol required to be performed the morning of the execution. Broom claims the check was never done, but the only evidence of this that he cites from the state-court record is the execution timeline itself, which makes no reference to it at all. (*See, e.g.*, Doc. 18 at 53, 75; Doc. 30 at 18.) It is possible that the vein check was

performed but never noted in the timeline. *See Cooney v. Kasich*, 801 F. Supp. 2d 623, 633-34 (S.D. Ohio 2011) (stating that Team Member #10, who had been on the execution team for every execution since 1999, testified that all three vein assessments had been performed for each execution and should have been conducted and recorded with Broom's, but conceded that the morning of Broom's execution attempt was "hectic" and the vein assessment may have occurred but was inadvertently omitted from the timeline).

The only indication that State or prison officials had that Broom's veins may be compromised, therefore, was one observation of diminished visibility and palpability of veins on one arm. And they did not expect to have difficulties with IV access based on that observation. Prison officials advised the ODRC regional director, Edwin Voorhies Jr., of the finding and the medical team "assured him this would not present a problem." *Broom*, 146 Ohio St. 3d at 61. The ODRC director at the time, Terry Collins, testified in *IOEPL* that he and the prison officials had "no reason to believe that morning they were going to have problems" with Broom's veins. (Doc. 19-7 at 32 (Collins Depo.))

Broom's own expert, Dr. Heath, testified at an *IOEPL* hearing that, based on his observations, Broom's veins should have been "easily accessed by a competent team." (Doc. 19-10 at 155-57 (Heath Test.)) He stated that he met with and examined Broom about a week after the failed execution attempt. (*Id.* at 156-57.) But he found nothing in Broom's self-reported medical history that would explain why the execution team was unable to obtain intravenous access. (*Id.* at 156.) He also explained that Broom exercised regularly, which should have made his veins more accessible. (*Id.*) And, Broom denied that he had ever engaged in intravenous drug use and Dr. Heath observed no scars or other damage indicating intravenous drug use. (*Id.*) Based on observations of Broom's veins

alone, therefore, State officials and prison officials should not have reasonably expected to encounter problems establishing IV access for Broom's execution.

In fact, the biggest problem with establishing IV access to Broom's veins was not *finding* a vein, it was *maintaining* access to a vein. As the Ohio Supreme Court reported, many prison officials and execution team members testified that team members were able to access veins, but could not maintain that access. *See, e.g., Broom*, 146 Ohio St. 3d at 62-63. Warden Kerns testified, for example, "We actually hit the veins, and as soon as we would start a saline drip the vein would bulge . . . so you can't use it, you have to make another attempt." (Doc. 19-7 at 187 (Kerns Depo.)). It eventually became clear to everyone involved, he stated, that, based on "how many times we actually got a good vein but it just wouldn't hold," they may not be able to find a viable vein and the execution would have to be canceled. (*Id.* at 192.)

Dr. Heath himself did not attempt to access Broom's veins; he only identified veins and opined on theoretical access. (*See* Doc. 19-10 at 155-57; 164-70 (Heath Test.)). As Broom argues, his expert was clear in his criticism of the execution team's technique in inserting the catheter and the number of insertions made. (*See id.*) But Broom points to only one criticism Dr. Heath made of the team's ability to maintain venous access (and the Court cannot find any other testimony of his on that subject): Dr. Heath describes possibly two instances in which the execution team "botched up that relatively simple process of attaching the I.V. tubing into the hub of the catheter" (*Id.* at 167.) It appears Dr. Heath did not provide an opinion regarding the reason the team was unable to maintain venous access once it was established. In fact, Dr. Heath acknowledged he did not know exactly what caused the problem, testifying:

In terms of putting in peripheral access, I think the thing that is most informative to me is their failure to do it on Mr. Broom, who has easy veins. And I'm not sure – I can't come up with any explanation for why they couldn't do it other than either they're not competent or there's something about the environment or the circumstances that made them unable to function at their normal level of expertise. Something went wrong there.

(*Id.* at 164.) It is possible, as the state court recognized, that the “circumstances” impeding IV access could have included Broom's veins being compromised, for whatever reason, and unable to withstand the intravenous procedures. *See Broom*, 146 Ohio St. 3d at 73 n.2.

The Ohio Supreme Court reasonably concluded, therefore, that the cause of the IV problems during Broom's failed execution attempt was “unclear.” *Id.* at 72. And if, ultimately, the cause of the problems maintaining IV access is unclear, it is impossible to say that it could or should have been foreseen. Given Ohio's prior problems establishing IV access in the Clark and Newton executions, and given the observation that Broom's veins on his left arm were compromised, it certainly was *possible* that problems may occur with Broom's IV access. But that does not mean that State or prison officials should have reasonably *expected* that to happen, especially in light of their new protocol and Broom's other apparently viable veins.

Moreover, foreseeability alone does not determine what qualifies as an “accident” under *Resweber*. As explained above, to prevail on his second-attempt claim, *Resweber* requires that Broom show not only that the failed attempt was foreseeable in the sense of being *unexpected*; it requires that Broom demonstrate that State or prison officials possessed a *cruel or malicious intent* to deliberately inflict pain, either in their actions during the failed execution attempt or in the execution procedure's design. But he asserts only conclusory allegations of the State's cruel intent. (*See, e.g.*, Doc. 18 at 64 (“The State

was deliberately indifferent to the risks.”). See also Doc. 18 at 67 (“pain, suffering and distress were deliberately and intentionally inflicted upon Broom”; “The State exhibited cruel indifference to Broom’s rights and his humanity on September 15, 2009.”)).

Accordingly, Broom has not shown that the failed execution attempt was a foreseeable and “cruelly willful attempt” under *Resweber*. *Resweber*, 329 U.S. at 463, 471.

Infliction of “unnecessary pain.” The Ohio Supreme Court provided a vivid account of Broom’s execution attempt and recognized that Broom “was in a great deal of pain” during the procedure. *Broom*, 146 Ohio St. 3d at 61-63. But it concluded that the physical and psychological trauma Broom experienced did not amount to “the type of torture prohibited by the Eighth Amendment.” *Id.* at 71. The state court also rejected Broom’s argument that Ohio was likely to violate its lethal injection protocol in a second attempt and seriously harm him based on Ohio’s corrective amendments of its protocol, the numerous successful executions since Broom’s failed execution and the Sixth Circuit’s affirmance of Ohio’s lethal-injection protocols as constitutional. *Id.* at 72-73.

Broom argues that the Ohio court unreasonably applied *Resweber* in making these determinations. As to the failed execution attempt, he contends it “constituted both physical and psychological torture.” (*Id.* at 8.) It was “more painful and physically invasive,” he asserts, than the attempt in *Resweber*. (*Id.* at 76-78.) He argues that each needle stab constituted a separate battery. (*Id.* at 78.) Broom recounts that he suffered eighteen to nineteen painful wounds at multiple places on his body; one needle hit his ankle bone; he bled from his wounds; he cried out in pain at times and eventually sobbed; and his bruises were still apparent three days later. (*Id.* at 77; *see also id.* at 58-59.) He further claims the psychological suffering was greater than in *Resweber* as he was left in “a state

of terror” for two hours rather than the short period of time Willie Francis suffered. (*Id.* at 8; Doc. 30 at 38.) The physical and psychological pain together, he asserts, made the failed execution attempt “even worse than a ‘mock execution.’” (Doc. 18 at 70.)

As Respondent argues, however, the source of difficulties in Broom’s execution attempt, obtaining IV access, was a “necessary suffering involved” in preparatory procedures for a method of execution (lethal injection) that has repeatedly been found constitutional, rather than a “cruelty inherent in the method of punishment[.]” *Resweber*, 329 U.S. at 464; *see also Baze* 553 U.S. at 47 (“Some risk of pain is inherent in any method of execution – no matter how humane – if only from the prospect of error in following the required procedure.”). After all, the State did not administer lethal drugs in Broom’s attempted execution; whereas in *Resweber*, Willie Francis was subjected to electrical currents. In fact, Broom never left the holding cell for the execution chamber. (*See, e.g.*, Doc. 19-7 at 202 (Kerns Depo.)).

Regarding the proposed execution, Broom focuses on the psychological pain it would inflict. He argues that the execution would be cruel and unusual because the severe trauma he experienced in the failed attempt would substantially increase the psychological impact and pain from a second attempt. (Doc. 30 at 37-38.) “Exposure to or threatened death,” he explains, is a psychiatrically recognized trauma. (*Id.* at 37 (quoting *Diagnostic and Statistical Manual of Mental Disorders* § 309.81 (5th ed. 2013)). Broom also points to Ohio Supreme Court Justice O’Neill’s comment in his dissent that “a second execution attempt after even one extremely painful and unsuccessful attempt is precisely the sort of ‘lingering death’ that the United States Supreme Court recognized as cruel within the meaning of the Eighth Amendment 125 years ago.” *Broom*, 146 Ohio St. 3d at 84 (quoting

In re Kemmler, 136 U.S. at 447). See also *Sireci v. Florida*, 137 S. Ct. 470, 470 (2016) (Breyer, J., dissenting from denial of *certiorari*) (noting Court’s denial of Broom’s *certiorari* petition and questioning whether a second attempt to execute Broom would amount to a cruel and unusual punishment, citing *Kemmler*’s statement that “[p]unishments are cruel when they involve . . . a lingering death”) (quoting *In re Kemmler*, 136 U.S. at 447). And he cites the Supreme Court’s recognition of Eighth Amendment protection against cruel and unusual punishment that cause psychological pain in *Trop v. Dulles*, 356 U.S. 86, 101-02 (1958).

Trop is not controlling clearly established federal law here, as it concerned the constitutionality of expatriation, not a second execution attempt. See *Wright v. Van Patten*, 552 U.S. 120, 125 (2008). And in *Resweber*, which is the governing clearly established federal law, the plurality expressly rejected the petitioner’s argument that having “once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment.” *Resweber*, 329 U.S. at 464. The Court explained, “The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block.” *Id.* See also *Estelle v. Gamble*, 429 U.S. 97, 105 (1976) (citing *Resweber* for proposition that “[a]n accident, although it may produce added anguish, is not on that basis alone to be characterized as wanton infliction of unnecessary pain.”). See also *Adams v. Bradshaw*, 826 F.3d 306, 320 (6th Cir. 2017) (finding no “clearly established” Supreme Court precedent for purposes of § 2254(d)(1) prohibiting death-penalty protocols that cause psychological harm).

Furthermore, nothing in the record refutes the Ohio Supreme Court’s finding that “the state’s intention in carrying out the [proposed] execution is not to cause unnecessary physical pain or psychological harm” *Broom*, 146 Ohio St. 3d at 71. And, as the state court noted, “we cannot assume that the same problems with IV access will befall Broom again.” *Id* at 72. Indeed, the Sixth Circuit repeatedly has upheld Ohio’s lethal-injection protocols as constitutional. *See, e.g., IOEPL*, 881 F.3d 447, 454 (6th Cir. 2018) (October 2016 protocol), *cert. denied*, 139 S. Ct. 216 (2018); *IOEPL*, 860 F.3d 881, 884-85 (6th Cir. 2017) (October 2016 protocol); *Cooley v. Strickland*, 604 F.3d 939, 944 (6th Cir. 2010) (November 2009 protocol, “Plan B”); *Cooley II*, 589 F.3d at 215-20 (November 2009 protocol). In reviewing the protocol revised after Broom’s failed execution, the circuit court observed:

The unfortunate incident of Ohio’s unsuccessful execution of Broom does not distinguish Ohio’s protocol from [Kentucky’s protocol] in *Baze*. When administered properly, both protocols are humane and constitutional. Ohio’s protocol, like Kentucky’s, is regrettably open to the possibility of mistaken application. The complete eradication of all risk of accident, however, is not yet possible, and the assertion that the mere possibility of future improper administration of the lethal injection despite the training and safeguards is too “attenuated” and “speculative”—and certainly not intended—to constitute cruel and unusual punishment.

Cooley II, 589 F.3d at 228.

Few would disagree that Ohio’s failed attempt to execute Broom was a deeply “unfortunate incident.” Nevertheless, Broom has not demonstrated that the state court was objectively unreasonable in deciding that the pain and trauma he endured as a result of the State’s initial execution attempt and the psychological pain he may experience in a second attempt do not rise to the level of an Eighth Amendment violation. The Ohio Supreme Court’s decision denying Broom’s Eighth Amendment claim, therefore, was neither

contrary to, nor an unreasonable application of, *Resweber*. Broom's first claim for relief fails.

III. Second Claim for Relief: *Double Jeopardy*

For his second claim for relief, Broom argues that any further attempt to execute him would violate the Fifth Amendment's guarantee against double jeopardy. (Doc. 18 at 85-103.) Broom presented this claim to state courts, which adjudicated it on the merits. *See Broom*, 146 Ohio St. 3d at 65-66. This claim, therefore, is ripe for habeas review.

The Fifth Amendment to the United States Constitution guarantees that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb" U.S. CONST. amend. V. The Double Jeopardy Clause provides criminal defendants with three distinct protections, barring a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969), *overruled on other grounds*, *Alabama v. Smith*, 490 U.S. 794 (1989).

The Ohio Supreme Court was the last state court to address Broom's double-jeopardy claim. After summarizing the federal and state law on the issue, it reasoned:

Broom argues that a second execution attempt would be an unconstitutional second punishment. He contends that for double-jeopardy purposes, the attempt to execute him began with the reading of the death warrant or at the very latest with the first insertion of a needle. Broom claims that once the attempt to execute him began, he had a reasonable expectation in the "finality" of his death sentence, meaning that his death should have occurred on September 15, 2009, because R.C. 2949.22(B) requires that a death sentence shall be executed on the day designated by a court. Because his life was once placed in "jeopardy" by virtue of the two hours of painful efforts to insert needles into his body, Broom argues, he may not again be required to undergo that same punishment.

The court of appeals rejected this claim on the grounds that Broom has not yet

been punished because his punishment is death: “An inmate can only be put to death once, and that process legislatively begins with the application of the lethal drugs.” 2012-Ohio-587, 2012 WL 504504, ¶ 23, citing R.C. 2949.22(A). The court relied on *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947), in making this conclusion. In *Resweber*, Willie Francis was placed in the electric chair, but when the switch was thrown, there was a mechanical difficulty and death did not result. *Id.* at 460, 67 S.Ct. 374. A plurality of the United States Supreme Court held that a proposed second attempt to execute Francis did not violate the Fifth, Eighth or Fourteenth Amendments. Because the court viewed the failed execution as an accident, it determined that the Double Jeopardy Clause did not preclude the state from carrying out the sentence. *Id.* at 463, 67 S.Ct. 374.

The Eighth District noted that the *Resweber* dissenters “distinguished the application of electricity to the inmate from merely placing the inmate in the electric chair with no application of electricity.” 2012-Ohio-587, 2012 WL 504504, at ¶ 22. By analogy, the court of appeals reasoned, the insertion of IV lines is merely a “preparatory” step to the execution. Until the lethal drugs flow through the tubes, the court reasoned, the state has not yet punished Broom within the meaning of the Fifth Amendment. *Id.* at ¶ 23. Thus, according to the court, the Double Jeopardy Clause has no application to multiple execution attempts. *Id.* at ¶ 25.

The state agrees with the assessment of the court of appeals. It contends that when the preparatory actions proved unsuccessful, the state halted the execution and the imposed sentence was never carried out. Therefore, the state argues, a second attempt to carry out that sentence will not violate the Double Jeopardy Clause. The state cites R.C. 2949.22(A), which provides that “a death sentence shall be executed *by causing the application to the person, upon whom the sentence was imposed, of a lethal injection of a drug or combination of drugs.*” (Emphasis added.) The state reads this language to mean that the execution attempt does not begin until lethal force or measure is applied.

We agree. There is no question that lethal drugs did not enter Broom's body. The execution attempt was halted after preparations to establish a viable IV line were unsuccessful. The establishment of viable IV lines is a necessary preliminary step, but it does not, by itself, place the prisoner at risk of death. As the statute makes clear, the execution commences when the lethal drug enters the IV line. In this case, because the attempt did not proceed to the point of injection of a lethal drug into the IV line, jeopardy never attached. Because there is no violation of the Fifth Amendment protection against double jeopardy, the state is not barred from a second attempt to execute Broom's death sentence.

Broom, 146 Ohio St. 3d at 65-66.

Broom argues that in this decision, the Ohio Supreme Court “failed to apply the governing federal constitutional principles, and it misapplied the law” under § 2254(d)(1). (Doc. 18 at 88.)²² The threshold question, again, is what clearly established federal law governs. *Williams v. Taylor*, 529 U.S. 362, 390 (2000).

Respondent maintains that *Resweber* controls this claim, clearly establishing that the Double Jeopardy Clause does not prohibit a second execution attempt after a failed first attempt. (Doc. 21 at 44-45.) The *Resweber* plurality assumed, without deciding, as it did regarding the Eighth Amendment, that a violation of the Fifth Amendment would violate the Due Process Clause of the Fourteenth Amendment. *Resweber*, 329 U.S. at 462. And it began its analysis by stressing the significance of the double-jeopardy protection: “First. Our minds rebel against permitting the same sovereignty to punish an accused twice for the same offense.” *Id.* The plurality then analogized the case to *Palko v. Connecticut*, 302 U.S. 319 (1937), in which a state tried a defendant a second time for a death-eligible offense after the defendant was previously acquitted on that charge. *Id.* The *Palko* Court held that the Fifth Amendment did not apply to the states, and concluded that the “kind of double jeopardy” to which the defendant was subjected in that case was not a “hardship so acute and shocking that our polity will not endure it” so as to violate the Fourteenth Amendment. *Palko*, 302 U.S. at 328. The justices found *Palko* “decisive.” *Resweber*, 329 U.S. at 463. “For we see no difference from a constitutional point of view,” they explained, “between a new trial for error of law at the instance of the state that results in a

²² Broom also argues, as he did with his first claim for relief, that the state court unreasonably determined the facts in deciding this claim. (Doc. 18 at 88.) But he does not dispute any specific state-court determinations of fact, and this Court, therefore, will not consider this claim under § 2254(d)(2).

death sentence instead of imprisonment for life and an execution that follows a failure of equipment.” *Id.* The justices continued,

When an accident, with no suggestion of malevolence, prevents the consummation of a sentence, the state's subsequent course in the administration of its criminal law is not affected on that account by any requirement of due process under the Fourteenth Amendment. We find no double jeopardy here which can be said to amount to a denial of federal due process in the proposed execution.

Id. at 463.

As with the Eighth Amendment claim, Justice Frankfurter found that the Fifth Amendment did not apply to the states and generally opined that a second execution attempt would not violate due process. *Id.* at 469-70.

Broom agrees with Respondent that *Resweber* clearly established that a failed execution attempt implicates double-jeopardy protection. (Doc. 30 at 40-41.) But he argues that the plurality's conclusion that no double-jeopardy violation occurred should not be followed because the justices were “constrained by” the *Palko* decision, which the Court expressly overruled in *Benton v. Maryland*, 395 U.S. 784 (1969). (*Id.* 41-42.) In *Benton*, the Court held that the Fifth Amendment applies to the states and under the Double Jeopardy Clause, unlike the “watered-down standard” of jeopardy enunciated in *Palko*, a state is not permitted a second attempt to obtain a death sentence. *Benton*, 395 U.S. at 793-95. Broom argues that *Benton* now also governs his claim, establishing that “double jeopardy precludes states from making multiple attempts to *complete* a death sentence where the first attempt failed due to error of the state.” (Doc. 30 at 42 (emphasis in original)).

Broom asserts that other Supreme Court precedent governs this claim as well, citing

a line of cases prohibiting states from increasing or augmenting a criminal sentence once the sentence has begun and the defendant has a reasonable expectation of its finality. (Doc. 18 at 86-88; Doc. 30 at 42-43 (citing, among other cases, *United States v. Halper*, 490 U.S. 435, 441 (1989); *North Carolina v. Pearce*, 395 U.S. 711 (1969); *United States v. DiFrancesco*, 449 U.S. 117, 127-28 (1980))). This authority, he maintains, supports his claim that “jeopardy ‘attached’ no later than the point when, under all the facts and circumstances of the first attempt, Broom had the legitimate expectation of finality in the completion of his death sentence that day.” (Doc. 18 at 89.)

Broom’s arguments are unavailing. First, *Benton*’s holding regarding multiple prosecutions and the Supreme Court precedent concerning increased sentencing do not “squarely address[]” the issue of a second execution attempt and therefore cannot constitute clearly established law under § 2254(d)(1). *Wright v. Van Patten*, 552 U.S. 120, 125 (2008).

Second, it is not clear what impact *Benton* has on the precedential value of the *Resweber* plurality’s double-jeopardy analysis. The justices expressly assumed that the Fifth Amendment’s Double Jeopardy Clause applied to Francis’ claim and seemed to rely on *Palko* more as a persuasive factual analogy than for its “watered-down standard” of double jeopardy the Court later rejected in *Benton*. Their conclusion, therefore, that the failed execution attempt did not constitute a double-jeopardy violation because it resulted from “an accident, with no suggestion of malevolence,” *Resweber*, 329 U.S. at 463, may survive *Benton*.

But either way, *Resweber* does not help Broom. To the extent *Resweber* clearly established only that the Double Jeopardy Clause may under some circumstances prohibit a

second execution attempt, Broom's claim fails because the Ohio Supreme Court neither contravened, nor misapplied that narrow holding. The state court considered the merits of Broom's claim and it reasonably concluded that Broom was not placed in jeopardy during the failed execution attempt because "[t]he establishment of viable IV lines [was] a necessary preliminary step, but it [did] not, by itself, place [Broom] at risk of death." *Broom*, 146 Ohio St. 3d at 66. And to the extent *Resweber* also clearly established that there is no double jeopardy where an execution attempt was unsuccessful due to an "innocent misadventure," *Resweber*, 329 U.S. at 471, Broom's claim still fails for the same reasons his Eighth Amendment claim fails: he has not demonstrated that the State and prison officials either expected the initial execution attempt to be unsuccessful or maliciously intended it to be unsuccessful. Finally, if *Resweber* is no longer good law on this issue because of *Benton*, then there is no clearly established federal law controlling Broom's double-jeopardy claim and he cannot prevail under §2254(d)(1) for that reason. *See, e.g., Lopez v. Smith*, 135 S. Ct. 1, 4 (2014).

Broom further argues that the Ohio Supreme Court's decision was unreasonable because it applied a state statute to determine whether jeopardy had "attached," which can only be determined by federal law. (Doc. 18 at 93-94 (citing *Crist v. Bretz*, 437 U.S. 28, 38 (1978); *Missouri v. Hunter*, 459 U.S. 359, 368 (1983); *Hoffler v. Bezio*, 726 F.3d 144, 156 (2d Cir. 2013))). The state court referenced Ohio's lethal-injection statute, which "makes clear" that "execution commences when the lethal drug enters the IV line[.]" and concluded that "because the attempt did not proceed to the point of injection of a lethal drug into the IV line, jeopardy never attached." *Broom*, 146 Ohio St. 3d at 66. *Resweber*, however, never addressed the issue of when jeopardy attaches and there is no clearly established

Supreme Court precedent that does so in this context. Moreover, in *Resweber*, Willie Francis was subjected to electrical currents, yet the Court still found no double-jeopardy violation.

Accordingly, the Ohio Supreme Court's determination that the State's proposed execution of Broom does not violate the Fifth Amendment's Double Jeopardy Clause was neither contrary to, nor an unreasonable application of, *Resweber*.

IV. Third Claim for Relief: *Due Process Violation / Ohio Post-Conviction Procedures*

Broom argues in his third claim for relief that the Ohio state courts denied him due process by failing to provide an adequate corrective process through its scheme for post-conviction relief. (Doc. 18 at 103-18.) Specifically, Broom faults the trial court's denial of his requests in post-conviction proceedings for discovery, funds for expert witnesses and an evidentiary hearing. (*See id.* at 105.) Broom presented this claim to state courts and the Ohio Supreme Court adjudicated it on the merits. *See Broom*, 146 Ohio St. 3d at 66-67. Respondent, however, contends this claim is not cognizable on federal habeas review. (Doc. 21 at 49-51.) The Court agrees.

The Sixth Circuit repeatedly has held that errors in state post-conviction proceedings are outside the scope of federal habeas corpus review. *See, e.g., Cress v. Palmer*, 484 F.3d 844, 853 (6th Cir. 2007); *Roe v. Baker*, 316 F.3d 557, 571 (6th Cir. 2002); *Greer v. Mitchell*, 264 F.3d 663, 681 (6th Cir. 2001); *Kirby v. Dutton*, 794 F.2d 245, 246 (6th Cir. 1986). This is because “the essence of habeas corpus is an attack by a person in custody upon the legality of that custody, and . . . the traditional function of the writ is to secure release from illegal custody.” *Kirby*, 794 F.2d at 246 (quoting *Preiser v.*

Rodriguez, 411 U.S. 475, 484 (1973)). Challenges to post-conviction proceedings “address collateral matters and not the underlying state conviction giving rise to the prisoner’s incarceration.” *Id.* at 247. A due-process claim related to collateral post-conviction proceedings, therefore, even if resolved in a petitioner’s favor, would not “result [in] . . . release or a reduction in . . . time to be served or in any other way affect his detention because we would not be reviewing any matter directly pertaining to his detention.” *Id.* Claims based on a state’s post-conviction process, therefore, cannot be brought in federal habeas proceedings. *Id.* at 246.

Indeed, the Sixth Circuit court recently declined to revisit this long-standing precedent, noting that it has never been overruled in an *en banc* proceeding and the Supreme Court has never ruled to the contrary. *Leonard v. Warden, Ohio State Penitentiary*, 846 F.3d 832, 854-55 (6th Cir. 2017). Moreover, the Sixth Circuit explained, “in the absence of Supreme Court precedent evaluating the constitutional adequacy of state post-conviction review proceedings, [the petitioner] cannot establish the necessary precondition for issuance of the writ—namely, that the decision of the Ohio Court of Appeals, which clearly evaluated the merits of his claim, ‘was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.’” *Id.*

Broom’s third claim for relief, therefore, also fails.

V. Fourth Claim for Relief: *Due Process Violation / Ohio Statutory Right to a Quick and Painless Death*

In Broom’s fourth claim for relief, he asserts that Ohio violated his procedural and substantive due-process rights by failing to protect his statutorily-created liberty and

property interests in a “quick and painless execution.” (Doc. 18 at 119.) Section 2949.22(A) of the Ohio Revised Code provides that “a death sentence shall be executed by causing the application to the person, upon whom the sentence was imposed, of a lethal injection of a drug or combination of drugs of sufficient dosage to quickly and painlessly cause death.” Ohio Rev. Code § 2949.22(A). Respondent argues that this claim is procedurally defaulted and meritless. (Doc. 21 at 52-55.)

Respondent contends this claim is procedurally defaulted because Broom did not raise it before the Ohio Supreme Court. (Doc. 21 at 52-53.) As Broom points out, however, he presented the claim to Ohio’s high court as his sixth proposition of law in his Amended Memorandum in Support of Jurisdiction. (See Doc. 19-11 at 158-61.) This claim was fairly presented to state courts and is not procedurally defaulted.

Respondent is correct, however, that this claim lacks merit. Broom cites no clearly established Supreme Court precedent recognizing a federal due process right based on this Ohio statute, or any other similar state statute. “Given the lack of holdings from [the] Court regarding [the issue] involved here, it cannot be said that the state court ‘unreasonabl[y] appli[ed] clearly established law’ under § 2254(d)(1). *Carey v. Musladin*, 549 U.S. 70, 77 (2006). In fact, the Sixth Circuit rejected this very claim in the § 1983 lethal-injection litigation, opining:

Biros also claims that the planned execution will violate his right to a “quick and painless death.” . . . He cites Ohio Revised Code § 2949.22(A), the statute that provides for a death caused by “a lethal injection of a drug ... of sufficient dosage to quickly and painlessly cause death.” But § 2949.22 creates no cause of action to enforce any right to a quick and painless death. *See State v. Rivera*, Nos. 08CA009426, 08CA009427, 2009 WL 806819, at *7 (Ohio Ct.App. Mar. 30, 2009) (“There is no ‘action’ for a quick and painless death” under Ohio Reg.Code Ann. § 2949.22(A).). We are not persuaded by Biros’s assertion that § 2949.22 creates a federal right because the statute creates “liberty and

property interests in a ‘quick and painless execution’ ” protected by the substantive component of the Due Process Clause of the Fourteenth Amendment. . . . Biros is unlikely to show that the reach of any such right extends beyond the incorporation of the Eighth Amendment. *Cf. Furman v. Georgia*, 408 U.S. 238, 359 n. 141, 92 S.Ct. 2726, 33 L.Ed.2d 346 (Marshall, J., concurring).

Cooley II, 589 F.3d at 234 (citations omitted).

Accordingly, the state court’s decision rejecting Broom’s fourth claim for relief neither contravened nor misapplied clearly established federal law and this claim is also denied.

CERTIFICATE OF APPEALABILITY ANALYSIS

The Court must now determine whether to grant a Certificate of Appealability (“COA”) for any of Broom’s claims for relief. The Sixth Circuit has held that neither a blanket grant nor a blanket denial of a COA is an appropriate means by which to conclude a capital habeas case as it “undermine[s] the gate keeping function of certificates of appealability, which ideally should separate the constitutional claims that merit the close attention of counsel and this court from those claims that have little or no viability.”

Porterfield v. Bell, 258 F.3d 484, 487 (6th Cir. 2001); *see also Murphy v. Ohio*, 263 F.3d 466 (6th Cir. 2001) (remanding motion for certificate of appealability for district court’s analysis of claims).

Habeas courts are guided in their consideration of whether to grant a COA by 28 U.S.C. § 2253, which provides in relevant part:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from --

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court . . .

(2) A certificate of appealability may issue under paragraph (12) only if the applicant has made a substantial showing of the denial of a constitutional right.

28 U.S.C. § 2253. This language is identical to the requirements set forth in the pre-AEDPA statutes, requiring the habeas petitioner to obtain a Certificate of Probable Cause. The sole difference between the pre- and post-AEDPA statutes is that the petitioner must now demonstrate he was denied a *constitutional*, rather than federal, right. *Slack v. McDaniel*, 529 U.S. 473, 483-04 (2000) (interpreting the significance of the revision between the pre- and post-AEDPA versions of that statute).

Furthermore, if a habeas claim is not procedurally defaulted, then the court need only determine whether reasonable jurists would find the district court's decision "debatable or wrong." *Id.* at 484. A more complicated analysis is required, however, when assessing whether to grant a COA for a claim the district court has determined is procedurally defaulted. In those instances, a COA should only issue if "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

After taking the above standards into consideration, the Court will not issue a COA for Broom's third claim for relief (Ohio's post-conviction scheme), as it is not cognizable on federal habeas review, and Broom's fourth claim for relief (due process), as no jurist of reason would debate the Court's conclusion on that claim. The Court will issue a COA for Broom's first (Eighth Amendment) and second (Fifth Amendment) claims for relief. A reasonable jurist could debate the Court's conclusions regarding these claims.

CONCLUSION

For the foregoing reasons, the Court denies Broom's Amended Petition for Writ of Habeas Corpus. (Doc. 18.) The Court further certifies that, pursuant to 28 U.S.C. § 1915(a)(3), an appeal from this decision could be taken in good faith as to Broom's first and second claims for relief and the Court issues a certificate of appealability pursuant to 28 U.S.C. § 2253(c) and Federal Rule of Appellate Procedure 22(b) as to those claims only. As to the remaining claims, the Court certifies that, pursuant to 28 U.S.C. § 1915(a)(3), an appeal from this decision could not be taken in good faith and that there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); Fed. R. App. P. 22(b).

IT IS SO ORDERED.

March 21, 2019
Date

s/ Christopher A. Boyko
Christopher A. Boyko
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

ROMELL BROOM,)	CASE NO. 1:10 CV 2058
)	
Petitioner,)	
)	JUDGE CHRISTOPHER A. BOYKO
vs.)	
)	
CHARLOTTE JENKINS, Warden,)	<u>JUDGMENT</u>
Respondent.)	

CHRISTOPHER A. BOYKO, J:

The Court has filed its Opinion and Order in the above-captioned case. Accordingly, this action is terminated pursuant to Federal Rule of Civil Procedure 58.

IT IS SO ORDERED.

s/ Christopher A. Boyko
CHRISTOPHER A. BOYKO
United States District Judge

Dated: March 21, 2019

Appendix D

APPX 0092

THE STATE OF OHIO, APPELLEE, v. BROOM, APPELLANT.

[Cite as *State v. Broom*, 146 Ohio St.3d 60, 2016-Ohio-1028.]

Criminal law—Death penalty—Eighth Amendment prohibition against cruel and unusual punishments and Fifth Amendment prohibition against double jeopardy—Cruel and Unusual Punishments and Double Jeopardy Clauses of U.S. and Ohio Constitutions do not bar state from carrying out death penalty after prior unsuccessful execution attempt—Trial court did not abuse its discretion in denying postconviction petition without additional discovery or evidentiary hearing—Court of appeals’ judgment affirmed.

(No. 2012-0852—Submitted June 9, 2015—Decided March 16, 2016.)

APPEAL from the Court of Appeals for Cuyahoga County, No. 96747,
2012-Ohio-587.

LANZINGER, J.

{¶ 1} In this case, we are asked to determine whether the state is barred by the Cruel and Unusual Punishments and Double Jeopardy Clauses of the United States and Ohio Constitutions from carrying out the death penalty against Romell Broom when attempts to insert an IV catheter were unsuccessful in an earlier scheduled execution. We hold that the state is not barred from carrying out his execution and therefore affirm the judgment of the court of appeals.

Case Background

{¶ 2} On October 3, 1985, a jury convicted appellant, Romell Broom, of aggravated murder with two felony-murder specifications (kidnapping and rape) in connection with the death of 14-year-old Tryna Middleton. Broom received a sentence of death, which was affirmed on appeal. 40 Ohio St.3d 277, 533 N.E.2d 682 (1988). After Broom exhausted his postconviction and federal remedies, this

Appendix E

court ordered the execution to proceed on September 15, 2009. 123 Ohio St.3d 114, 2009-Ohio-4778, 914 N.E.2d 392, ¶ 21 and fn. 2.

Facts of September 15, 2009

{¶ 3} Broom was transported to the Southern Ohio Correctional Facility (“Lucasville”) on September 14, 2009, in anticipation of his execution scheduled for the next day. Upon his arrival at Lucasville, a nurse and a phlebotomist conducted a vein assessment and found that Broom’s right-arm vein appeared accessible, but his left-arm vein seemed less so. Prison officials communicated this information to Edwin C. Voorhies Jr., the regional director for the Office of Prisons of the Ohio Department of Rehabilitation and Correction (“ODRC”), and the medical team assured him that this would not present a problem.

{¶ 4} At 1:59 p.m. on September 15, the warden finished reading the death warrant to Broom. One minute later, Team Members 9 (a female) and 21 (a male) entered the holding cell to prepare the catheter sites.

{¶ 5} Team Member 9 made three attempts to insert a catheter into Broom’s left arm but was unable to access a vein. At the same time, Team Member 21 made three unsuccessful stabs into Broom’s right arm. After a short break, Member 9 made two more insertions, the second of which caused Broom to scream aloud from the pain.

{¶ 6} Member 21 managed to insert the IV catheter into a vein, but then he lost the vein and blood began running down Broom’s arm. When that occurred, Member 9 rushed out of the room, saying “no” when a security officer asked if she was okay.

{¶ 7} Director Voorhies testified that he could tell there was a problem in the first 10 to 15 minutes. Warden Phillip Kerns saw the team make six or seven attempts on Broom’s veins during the same 10- to-15-minute period. According to Kerns, the team members did hit veins, but as soon as they started the saline drip, the vein would bulge, making it unusable.

{¶ 8} About 15 minutes into the process, Kerns and Voorhies saw Member 9 leave the holding cell. Voorhies described her as sweating “profusely” and heard her say that she and Member 21 had both accessed veins, but the veins “blew.” Member 17 then entered the holding cell and made “several attempts” to access a vein in Broom’s left arm. Simultaneously, Member 21 continued his attempts on Broom’s right arm.

{¶ 9} Terry Collins, who was then the director of the ODRC, called a break about 45 minutes into the process to consult with the medical team. The break lasted 20 to 25 minutes. The medical team reported that they were gaining IV access but could not sustain it when they tried to run saline through the line. They expressed “clear concern” about whether they would get usable veins. But because they said that there was a reasonable chance of establishing venous access, the decision was made to continue.

{¶ 10} By this time, Broom was in a great deal of pain from the puncture wounds, which made it difficult for him to move or stretch his arms. The second session commenced with three medical team members—9, 17, and 21—examining Broom’s arms and hands for possible injection sites. For the first time, they also began examining areas around and above his elbow as well as his legs. They also reused previous insertion sites, and as they continued inserting catheter needles into already swollen and bruised sites, Broom covered his eyes and began to cry from the pain. Director Voorhies remarked that he had never before seen an inmate cry during the process of venous access.

{¶ 11} After another ten minutes or so, Warden Kerns asked a nurse to contact the Lucasville physician to see if she would assess Broom’s veins and offer advice about finding a suitable vein. Broom later stated that he saw “an Asian woman,” whom he erroneously identified as “the head nurse,” enter the chamber. Someone handed her a needle, and when she inserted it, she struck bone, and Broom

screamed from the pain. At the same time, another team member was attempting to access a vein in Broom's right ankle.

{¶ 12} The Lucasville physician confirmed that she came to Broom's cell, examined his foot, and made one unsuccessful attempt to insert a needle but quickly concluded that the effort would not work. By doing so, she disobeyed the warden's express instructions to observe only and not get involved. The physician examined Broom's foot but could see no other vein.

{¶ 13} After the physician departed, the medical team continued trying to establish an IV line for another five to ten minutes. In all, the second session lasted approximately 35 to 40 minutes.

{¶ 14} During the second break, the medical team advised that even if they successfully accessed a vein, they were not confident that the site would remain viable throughout the execution process. The governor's office had signaled its willingness to grant a reprieve, and so the decision was made to halt the execution for the day.

{¶ 15} Dr. Jonathan Groner examined and photographed Broom three or four days afterward. The photographs show 18 injection sites: one on each bicep, four on his left antecubital (forearm), three on his right antecubital, three on his left wrist, one on the back of his left hand, three on the back of his right hand, and one on each ankle. Prison officials later confirmed that he was stuck at least 18 times.

{¶ 16} Dr. Mark Heath met with Broom one week after the event. Dr. Heath observed "considerable bruising" and a lot of "deep and superficial" tissue damage consistent with multiple probing. Dr. Heath also posited that the actual number of catheter insertions was much higher than the number of needle marks, because according to what Broom told him, the medical team would withdraw the catheter partway and then reinsert it at a different angle, a procedure known as "fishing."

Subsequent Litigation

{¶ 17} Broom has pursued multiple avenues challenging any further attempt by the state to execute him. He filed a civil-rights complaint under 42 U.S.C. 1983 (“Section 1983”) in the United States District Court for the Southern District of Ohio on September 18, 2009. He argued that a second attempt to execute him would violate the Eighth Amendment’s prohibition on cruel and unusual punishments and the Fifth Amendment right against double jeopardy. The federal court dismissed these claims without prejudice as procedurally improper. *Broom v. Strickland*, S.D. Ohio No. 2:09-cv-823, 2010 WL 3447741 (Aug. 27, 2010). On the same day that he filed his Section 1983 complaint, Broom filed an original action for a writ of habeas corpus in this court (case No. 2009-1686), which he later voluntarily dismissed. *In re Broom*, 123 Ohio St.3d 1485, 2009-Ohio-5883, 916 N.E.2d 482. On September 14, 2010, Broom filed a federal habeas action, which is stayed pending exhaustion of his Eighth Amendment claim in state court, *Broom v. Bobby*, N.D. Ohio No. 1:10 CV 2058, 2010 WL 4806820 (Nov. 18, 2010), and a second state-court habeas action (case No. 2010-1609), which this court dismissed, *In re Broom*, 127 Ohio St.3d 1450, 2010-Ohio-5836, 937 N.E.2d 1039.

{¶ 18} On September 15, 2010, Broom filed a successive petition for postconviction relief in the Cuyahoga County Court of Common Pleas, asserting that any future attempt to execute him would be unconstitutional. On April 7, 2011, the trial court denied Broom’s petition without conducting an evidentiary hearing. The trial court held that a second execution attempt would not violate the Fifth or Eighth Amendment. And the court concluded that Broom’s experience of repeated needle sticks, although “unpleasant,” was not sufficiently torturous to implicate the Eighth Amendment.

{¶ 19} The Eighth District Court of Appeals affirmed on different grounds. Thereafter, the court denied Broom’s request for en banc review. *State v. Broom*, 8th Dist. Cuyahoga No. 96747 (Apr. 5, 2012).

{¶ 20} Broom appealed to this court, and we accepted jurisdiction on three propositions of law:

(1) The lower courts erred when they found that the Cruel and Unusual Punishments Clauses of the Eighth and Fourteenth Amendments to the United States Constitution, and Article I, Section 9 of the Ohio Constitution do not bar another attempt to execute Broom.

(2) The lower courts denied Broom due process of law, an adequate corrective process, and his day in court on his “no multiple attempts” claims when [a] the trial court denied him discovery and a hearing, and [b] the appellate court, in a case of first impression and without prior notice to Broom, adopted a new case-specific and fact-based standard for adjudicating Broom’s unique and rare constitutional claims, and then refused to remand the case to the trial court so that Broom could develop evidence and present argument that he meets that new standard.

(3) The lower courts erred when they found that a second attempt to execute Broom would not violate the prohibitions against being placed twice in jeopardy for the same offense in the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 10 of the Ohio Constitution.

See 139 Ohio St.3d 1403, 2014-Ohio-2245, 9 N.E.3d 1062. For ease of discussion, we will address them out of order.

Analysis

Double Jeopardy

{¶ 21} The Fifth Amendment provides that no person shall “be subject for the same offence to be twice put in jeopardy of life or limb.” The Double Jeopardy Clause protects against three distinct evils: a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969), *overruled on other grounds*, *Alabama v. Smith*, 450 U.S. 794, 109 S.Ct. 2201, 104 L.Ed.2d 865 (1989). Ohio’s constitutional prohibition against double jeopardy, Article I, Section 10, is coextensive with the federal clause. *State v. Brewer*, 121 Ohio St.3d 202, 2009-Ohio-593, 903 N.E.2d 284, ¶ 14.

{¶ 22} Broom argues that a second execution attempt would be an unconstitutional second punishment. He contends that for double-jeopardy purposes, the attempt to execute him began with the reading of the death warrant or at the very latest with the first insertion of a needle. Broom claims that once the attempt to execute him began, he had a reasonable expectation in the “finality” of his death sentence, meaning that his death should have occurred on September 15, 2009, because R.C. 2949.22(B) requires that a death sentence shall be executed on the day designated by a court. Because his life was once placed in “jeopardy” by virtue of the two hours of painful efforts to insert needles into his body, Broom argues, he may not again be required to undergo that same punishment.

{¶ 23} The court of appeals rejected this claim on the grounds that Broom has not yet been punished because his punishment is death: “An inmate can only be put to death once, and that process legislatively begins with the application of the lethal drugs.” 2012-Ohio-587, 2012 WL 504504, ¶ 23, citing R.C. 2949.22(A). The court relied on *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 67 S.Ct. 374, 91 L.Ed. 422 (1947), in making this conclusion. In *Resweber*, Willie Francis

was placed in the electric chair, but when the switch was thrown, there was a mechanical difficulty and death did not result. *Id.* at 460. A plurality of the United States Supreme Court held that a proposed second attempt to execute Francis did not violate the Fifth, Eighth or Fourteenth Amendments. Because the court viewed the failed execution as an accident, it determined that the Double Jeopardy Clause did not preclude the state from carrying out the sentence. *Id.* at 463.

{¶ 24} The Eighth District noted that the *Resweber* dissenters “distinguished the application of electricity to the inmate from merely placing the inmate in the electric chair with no application of electricity.” 2012-Ohio-587, 2012 WL 504504, at ¶ 22. By analogy, the court of appeals reasoned, the insertion of IV lines is merely a “preparatory” step to the execution. Until the lethal drugs flow through the tubes, the court reasoned, the state has not yet punished Broom within the meaning of the Fifth Amendment. *Id.* at ¶ 23. Thus, according to the court, the Double Jeopardy Clause has no application to multiple execution attempts. *Id.* at ¶ 25.

{¶ 25} The state agrees with the assessment of the court of appeals. It contends that when the preparatory actions proved unsuccessful, the state halted the execution and the imposed sentence was never carried out. Therefore, the state argues, a second attempt to carry out that sentence will not violate the Double Jeopardy Clause. The state cites R.C. 2949.22(A), which provides that “a death sentence shall be executed *by causing the application to the person, upon whom the sentence was imposed, of a lethal injection of a drug or combination of drugs.*” (Emphasis added.) The state reads this language to mean that the execution attempt does not begin until lethal force or measure is applied.

{¶ 26} We agree. There is no question that lethal drugs did not enter Broom’s body. The execution attempt was halted after preparations to establish a viable IV line were unsuccessful. The establishment of viable IV lines is a necessary preliminary step, but it does not, by itself, place the prisoner at risk of

death. As the statute makes clear, the execution commences when the lethal drug enters the IV line. In this case, because the attempt did not proceed to the point of injection of a lethal drug into the IV line, jeopardy never attached. Because there is no violation of the Fifth Amendment protection against double jeopardy, the state is not barred from a second attempt to execute Broom's death sentence.

Due Process

{¶ 27} In his second proposition of law, Broom raises two due-process concerns. First, he alleges that the trial court should have permitted him to conduct discovery and should have held a hearing on his petition for postconviction relief. Second, he argues that the Eighth District adopted a new standard—deliberate indifference—to analyze his petition and that the appellate court should have remanded the case to the trial court to hold a hearing under that standard.

Discovery and Hearing

{¶ 28} A postconviction proceeding is not an appeal of a criminal conviction but, rather, is a collateral, civil attack on a criminal judgment. *State v. Steffen*, 70 Ohio St.3d 399, 410, 639 N.E.2d 67 (1994). The right to file a postconviction petition is a statutory right, not a constitutional right. *State v. Calhoun*, 86 Ohio St.3d 279, 281, 714 N.E.2d 905 (1999). R.C. 2953.21 grants a petitioner only those rights specifically enumerated in its provisions and no more. *Calhoun* at 281. This court has never held that there is a right to discovery in postconviction proceedings. *See State ex rel. Love v. Cuyahoga Cty. Prosecutor's Office*, 87 Ohio St.3d 158, 159, 718 N.E.2d 426 (1999). And because R.C. 2953.21 is silent about discovery, the decision to grant or deny a request for discovery rests with a trial court's sound discretion.

{¶ 29} An evidentiary hearing is not automatically guaranteed each time a defendant files a petition for postconviction relief. R.C. 2953.21(C) (“*Before granting a hearing on a petition * * *, the court shall determine whether there are substantive grounds for relief*” [emphasis added]). A trial court has the discretion

to deny a postconviction petition without discovery or an evidentiary hearing if the petition, supporting affidavits, documentary evidence, and trial record do not demonstrate “sufficient operative facts to establish substantive grounds for relief.” *Calhoun* at paragraph two of the syllabus. To warrant an evidentiary hearing in a postconviction proceeding, a petitioner must submit evidence outside the record that sufficiently establishes that the petitioner is entitled to relief on one or more asserted constitutional grounds. R.C. 2953.21(A); *Calhoun* at 283.

{¶ 30} The decision to grant or deny a postconviction petition should be upheld absent an abuse of discretion, and a reviewing court should not overrule the trial court’s determination if it is supported by competent and credible evidence. *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 58.

{¶ 31} Here, there is no indication that further discovery or a hearing is required. Broom submitted an affidavit and other documentary exhibits, deposition testimony from participants at his attempted execution and other transcripts from the federal proceeding in *Cooey v. Strickland*, case No. 2:04-cv-1156, 2009 WL 4842393 (S.D. Ohio Dec. 7, 2009), and photographs of his puncture marks. There is no dispute as to any operative fact in connection with the events of September 14 and 15, 2009. Although he made a vague request in his postconviction petition for discovery and a hearing, a review of the docket shows that Broom never filed a discovery request while the matter was pending in the trial court. He also has failed to proffer what that additional discovery was or how a hearing would aid the trial court in resolving the legal questions before it. We agree with the court of appeals that the trial court based its decision on the undisputed and voluminous evidence it had and that the trial judge did not abuse his discretion in denying Broom’s petition without additional discovery or an evidentiary hearing. There is no need for remand on this issue.

Deliberate Indifference

{¶ 32} The trial court dismissed Broom’s postconviction petition because, although “repeated needle sticks are indeed unpleasant, they are not torture,” and because there was not a substantial risk of serious harm present. The Eighth District, however, used a different method of reasoning. After holding that multiple execution attempts do not per se constitute cruel and unusual punishment, 2012-Ohio-587, 2012 WL 504504, at ¶ 24, the majority opinion divided Broom’s allegations into two categories: injuries allegedly sustained as a result of the state’s following its execution protocol and injuries allegedly sustained as a result of the state’s deviating from its execution protocol. Treating the first category as a facial challenge to Ohio’s execution protocol, the court of appeals rejected the challenge as untimely. *Id.* at ¶ 31 and 34. The court also cited federal-court decisions affirming the constitutionality of state lethal-injection protocols. *Id.* at ¶ 35, citing *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) (plurality opinion) (affirming Kentucky’s three-drug execution protocol); *Cooley v. Strickland*, 589 F.3d 210, 227-228 (6th Cir. 2009) (holding that the failure to impose a time limit on the search for accessible veins did not make Ohio’s protocol unconstitutional).

{¶ 33} The Eighth District then separately analyzed Broom’s allegations that prison officials deviated from Ohio’s execution protocol in his attempted execution using the conditions-of-confinement standard, which requires proof of a state official’s subjective state of mind. 2012-Ohio-587, 2012 WL 504504, at ¶ 47-48.

{¶ 34} We disagree with this analysis. The process of carrying out an execution is more analogous to the method-of-execution cases than to conditions-of-confinement cases. Moreover, according to the plurality opinion in *Baze*, to prevail on an Eighth Amendment claim based on a risk of future harm, “there must be a ‘substantial risk of serious harm,’ an ‘objectively intolerable risk of harm.’ ”

(Emphasis added.) *Baze* at 50, quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994), and fn. 9. This formulation appears irreconcilable with a requirement of proof of a prison official’s subjective intent. *Jackson v. Danberg*, 594 F.3d 210, 223 (3d Cir.2010), fn. 16 (*Baze* does not incorporate deliberate-indifference language into method-of-execution cases).

{¶ 35} Although we do not agree with the Eighth District’s use of the deliberate-indifference standard, the trial court properly relied on *Resweber* and *Baze* to shape its analysis. As there was no due-process violation, it is not necessary to remand for a further hearing.

Cruel and Unusual Punishment

The Eighth Amendment to the U.S. Constitution

{¶ 36} The Eighth Amendment to the U.S. Constitution states, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The death penalty has been acknowledged as an acceptable form of punishment since the adoption of the United States Constitution and the Bill of Rights. *Glossip v. Gross*, ___ U.S. ___, 135 S.Ct. 2726, 2731, 192 L.Ed.2d 761 (2015). The United States Supreme Court has recognized that the Eighth Amendment prohibition against cruel and unusual punishments imposes two separate limitations. The first is a requirement of proportionality, *Miller v. Alabama*, ___ U.S. ___, 132 S.Ct. 2455, 2463, 183 L.Ed.2d 407 (2012), and the second is a prohibition against specific torturous methods of punishment, *Graham v. Florida*, 560 U.S. 48, 59, 130 S.Ct. 2011, 176 L.Ed.2d 825 (2010). Broom’s challenge does not fit neatly into either category.

{¶ 37} In noncapital cases, the Eighth Amendment proportionality principle is narrow and “ ‘forbids only extreme sentences’ ” that are grossly disproportionate to the crime. *Graham* at 59-60, quoting *Harmelin v. Michigan*, 501 U.S. 957, 1001, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991) (Kennedy, J., concurring). In capital cases, proportionality analysis involves two subsets, “one considering the nature of the

offense, the other considering the characteristics of the offender.” *Id.* at 60. With respect to the nature of the offense, proportionality in capital cases merely stands for the proposition that the punishment must fit the crime. *See, e.g., Kennedy v. Louisiana*, 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008) (holding that an offender’s death sentence for the rape of a child who did not die is unconstitutionally disproportionate).

{¶ 38} As for the second category, the United States Supreme Court has held that the death penalty is unconstitutionally disproportionate when imposed upon individuals whose personal characteristics diminish their personal moral responsibility for the crimes they have committed. *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) (prohibiting the execution of juvenile offenders); *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) (forbidding the execution of a defendant with intellectual disability). But *Broom* suggests no reason why his case might fall under this line of jurisprudence.

{¶ 39} With regard to the method of execution, the United States Supreme Court has long held that punishments are cruel “when they involve torture or a lingering death,” *In re Kemmler*, 136 U.S. 436, 447, 10 S.Ct. 930, 34 L.Ed. 519 (1890), or when they “ ‘involve the unnecessary and wanton infliction of pain,’ ” *Rhodes v. Chapman*, 452 U.S. 337, 346, 101 S.Ct. 2392, 69 L.Ed.2d 59 (1981), quoting *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). The United States Supreme Court has never struck down a specific execution method as cruel and unusual. Instead, the court has offered examples of execution methods that would constitute “torture or lingering death” as negative contrasts to a more humane method the court chose to affirm. For example, in affirming the constitutionality of execution by firing squad, the court contrasted the practice with live disemboweling, beheading, and quartering; with burning alive; and with public dissection. *Wilkerson v. Utah*, 99 U.S. 130, 135, 25 L.Ed. 345 (1878); *see also In re Kemmler* at 446-447 (affirming the constitutionality of

electrocution but stating that crucifixion and the breaking wheel would be cruel); *Baze*, 553 U.S. at 94-99, 128 S.Ct. 1520, 170 L.Ed.2d 420 (Thomas, J., concurring) (contrasting lethal injection to flaying, branding cheeks, dismemberment, cutting off hands or ears, and slitting nostrils).

{¶ 40} The foremost consideration, when analyzing a method of execution, is often the “objective evidence of the pain involved in the challenged method.” *Campbell v. Wood*, 18 F.3d 662, 682 (9th Cir.1994); accord *Cooey*, 589 F.3d at 223. But pain is not necessarily the only indicator of cruelty. The Eighth Amendment also demands that a penalty accord with “ ‘the dignity of man.’ ” *Hope v. Pelzer*, 536 U.S. 730, 738, 122 S.Ct. 2508, 153 L.Ed.2d 666 (2002), quoting *Trop v. Dulles*, 356 U.S. 86, 100, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958) (lead opinion).

{¶ 41} In its most recent method-of-execution case, the United States Supreme Court examined whether Oklahoma’s lethal-injection protocol violated the Eighth Amendment. The court followed the plurality opinion in *Baze* and noted that a prisoner’s challenge to a method of execution under the Eighth Amendment will fail unless the prisoner establishes that the method of execution presents a substantial risk of serious harm that is objectively intolerable and prevents prison officials from claiming that they were subjectively blameless. *Glossip*, ___ U.S. at ___, 135 S.Ct. at 2737, 192 L.Ed.2d 761 (rejecting prisoners’ claim of Eighth Amendment violation because they failed to establish a substantial risk of harm and a known and available alternative). It is not enough that a prisoner shows that there is a slightly or marginally safer alternative. Instead, the prisoner must identify an alternative that is “ ‘feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.’ ” (Brackets sic.) *Id.*, quoting *Baze* at 52.

{¶ 42} Broom’s actual sentence of death is not at issue, nor does this case concern Ohio’s chosen method of execution. Instead, Broom asserts that a second execution attempt would constitute cruel and unusual punishment. He claims that

what he already experienced went beyond the time, pain, and emotional anguish involved in a “normal” execution. Because there is no guarantee of success, Broom contends, any further attempt to execute him would be cruel and unusual.

{¶ 43} Broom’s claim has no precedent in Ohio. The United States Supreme Court, however, considered whether a failed execution attempt violated the Eighth Amendment in *Resweber*. After the mechanical difficulty with the electric chair failed to result in Francis’s death, a new death warrant was issued. *Id.*, 329 U.S. at 460, 67 S.Ct. 374, 91 L.Ed. 422. Francis objected and argued that once he underwent “the psychological strain of preparation for electrocution,” to require him to undergo the preparation a second time would subject him to lingering or cruel and unusual punishment. *Id.* at 464. A four-member plurality rejected this argument, because “[t]he cruelty against which the Constitution protects a convicted man is cruelty inherent in the *method of punishment*, not the necessary suffering involved in any method employed to extinguish life humanely.” (Emphasis added.) *Id.* at 464.

{¶ 44} The dissenting justices noted that electrocution is statutorily and constitutionally permissible only if it is “so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death itself.” *Id.* at 474 (Burton, J., dissenting). The dissenters rejected the prospect of execution by installments, what they termed “a delayed process of execution.” *Id.* at 474-475.

{¶ 45} Justice Frankfurter cast the deciding vote. He joined the plurality to reject Francis’s appeal because he did not believe that the Fourteenth Amendment made the Bill of Rights applicable to the states.¹ According to Justice Frankfurter,

¹ The United States Supreme Court later repudiated Frankfurter’s position: The Due Process Clause of the Fourteenth Amendment does incorporate the Eighth Amendment’s protections against cruel and unusual punishments to apply to the states. *Robinson v. California*, 370 U.S. 660, 666-667, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

the Due Process Clause of the Fourteenth Amendment limited a state’s criminal procedures only insofar as a state practice “ ‘offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.’ ” *Id.* at 469 (Frankfurter, J., concurring), quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105, 54 S.Ct. 330, 78 L.Ed. 674 (1934). Justice Frankfurter did not believe that Louisiana’s treatment of Francis rose to that level. As a result, Willie Francis went to the electric chair a second time.

{¶ 46} Based on *Resweber*, we determine, as did the Eighth District, that there is no per se prohibition against a second execution attempt based on the Cruel and Unusual Punishments Clause of the Eighth Amendment. The state’s intention in carrying out the execution is not to cause unnecessary physical pain or psychological harm, and the pain and emotional trauma Broom already experienced do not equate with the type of torture prohibited by the Eighth Amendment.

{¶ 47} Having determined that allowing the state to go forward with Broom’s execution does not amount to a per se violation of the Eighth Amendment, we consider whether it is violated under the test set forth in *Glossip* and *Baze*. Broom argues that the state should have known of the potential problems with his execution beforehand. He submitted evidence that the state experienced problems establishing and maintaining IV catheters during the previous executions of Joseph Clark and Christopher Newton and that problems should have been expected when Broom’s first vein assessment indicated that there may be trouble accessing the veins. But, it is unclear from the record why Broom’s execution team was unable to establish IV access. Although Dr. Heath suggested that it was poor technique, it is Broom’s burden to establish that he is likely to suffer severe pain if required to undergo a second execution.

{¶ 48} Further, in December 2009, less than three months after the attempt to execute Broom, the Sixth Circuit rejected a constitutional challenge to Ohio’s execution protocol, noting that “[s]peculations, or even proof, of medical

negligence in the past or in the future are not sufficient to render a facially constitutionally sound protocol unconstitutional.” *Cooley*, 589 F.3d at 225. The protocol that the Sixth Circuit reviewed in *Cooley* has been amended and we cannot assume that the same problems with IV access will befall Broom again.

{¶ 49} Broom also contends that the state’s violation of the execution protocols indicates that prison officials were not blameless and created a substantial risk of harm. We agree that compliance with execution protocols is the best way to avoid the risk of severe pain, but deviation from a protocol is not an automatic constitutional violation. *See In re Ohio Execution Protocol Litigation (Wiles)*, 868 F.Supp.2d 625, 626 (S.D. Ohio 2012) (protections of the United States Constitution “do not require perfect adherence to every single provision of Ohio’s execution protocol without deviation”). We are not convinced, however, that Broom has established that the state is likely to violate its execution protocol in the future.

{¶ 50} Following the events of September 15, 2009, the state was enjoined from carrying out the executions of Kenneth Smith and Charles Lorraine based in large part on the federal district court’s determination that Ohio was not following its execution protocol. *See Cooley v. Kasich*, 801 F.Supp.2d 623 (S.D. Ohio 2011); *In re Ohio Execution Protocol Litigation (Lorraine)*, 840 F.Supp.2d 1044 (S.D. Ohio 2012).

{¶ 51} The state sought to address the concerns of the federal district court. It amended the protocol, adding a new command structure and forms that were required to be filled out as each step of the protocol was completed to ensure compliance. *Wiles* at 629-632. The state sufficiently demonstrated a commitment to follow the protocol and was allowed to proceed with the execution of Mark Wiles. *Id.* at 652. Several more executions occurred without any apparent violation of the protocol. *In re Ohio Execution Protocol Litigation (Phillips)*, S.D. Ohio No. 2:11-cv-1016, 2013 WL 5963150, *11-16 (Nov. 7, 2013). This led the district court to conclude that “ ‘Ohio does not have a perfect execution system, but it has a

constitutional system that it appears to be following.’ ” *Id.*, quoting *In re Ohio Execution Protocol Litigation (Hartman)*, 906 F.Supp.2d 759, 791 (S.D. Ohio 2012).

{¶ 52} While we acknowledge that the state failed to follow the protocol in 2009, we cannot ignore what has transpired since then. The state has executed 21 death-row inmates since the attempted execution of Broom. *See* Ohio Department of Rehabilitation and Correction, *Ohio Executions—1999 to Present*, <http://www.drc.ohio.gov/web/executed/executed25.htm> (last updated Jan. 16, 2014).

{¶ 53} To be clear, the state must comply with the protocol as amended. Strict compliance with the protocol will ensure that executions are carried out in a constitutional manner and can also prevent or reveal an inmate’s attempt to interfere with the execution process.² We simply are unable to conclude that Broom has established that the state in carrying out a second attempt is likely to violate its protocol and cause severe pain.

{¶ 54} We therefore conclude that the Eighth Amendment does not bar the state from carrying out Broom’s execution.

² At oral argument, the state speculated that Broom himself caused the difficulty in accessing his veins by taking antihistamines to dehydrate himself. There was also a reference in the official timeline of Broom’s execution that the “[m]edical team [was] having [a] problem maintaining an open vein due to past drug use.” However, there is no evidence in the record supporting either allegation. We mention these allegations only to illustrate that following the current execution protocol could reveal potential problems with IV access. For instance, the protocol requires four vein checks and a review of the inmate’s medical chart, which may include information regarding prior drug use. Ohio Department of Rehabilitation and Correction, *Policy No. 01-COM-11*, at 6, 9, 11, http://www.drc.ohio.gov/web/drc_policies/documents/01-COM-11.pdf (accessed Jan. 25, 2016). Also, after transfer to the Death House, the inmate is to be constantly monitored by at least three members of the execution team who are required to maintain an execution timeline. *Id.* at 2 and 9. The execution timeline is supposed to record certain specified events, such as the vein checks and other information at the discretion of the execution team. *Id.* at 2. And certainly, the ingestion of antihistamines should be a noteworthy event.

Article I, Section 9 of the Ohio Constitution

{¶ 55} Broom has also sought relief under the Ohio Constitution. Article I, Section 9 of the Ohio Constitution provides, “Excessive bail shall not be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted.” This court has long held that the Ohio Constitution is a “document of independent force.” *Arnold v. Cleveland*, 67 Ohio St.3d 35, 616 N.E.2d 163 (1993), paragraph one of the syllabus. The United States Constitution provides a floor for individual rights and civil liberties, but state constitutions are free to accord greater protections. *Id.* And recently, this court held for the first time that Article I, Section 9 provides protection “independent of” the Eighth Amendment. *In re C.P.*, 131 Ohio St.3d 513, 2012-Ohio-1446, 967 N.E.2d 729, ¶ 59. But we have also noted that cases involving cruel and unusual punishments are rare, “limited to those involving sanctions which under the circumstances would be considered shocking to any reasonable person.” *McDougle v. Maxwell*, 1 Ohio St.2d 68, 70, 203 N.E.2d 334 (1964).

{¶ 56} When the execution team was unable to establish IV lines, the attempt to execute Broom was halted. Because the lethal-injection drugs were never introduced into the IV lines, the execution was never commenced. The state also demonstrated in the executions that were conducted after September 2009 that it is committed to following the protocols as written. Because Broom’s life was never at risk since the drugs were not introduced, and because the state is committed to carrying out executions in a constitutional manner, we do not believe that it would shock the public’s conscience to allow the state to carry out Broom’s execution. We therefore conclude that Article I, Section 9 of the Ohio Constitution does not bar the state from executing Broom’s death sentence.

Conclusion

{¶ 57} The judgment of the Cuyahoga County Court of Appeals is affirmed.

Judgment affirmed.

O’CONNOR, C.J., and O’DONNELL and KENNEDY, JJ., concur.

FRENCH, J., dissents with an opinion in which PFEIFER, J., joins.

O’NEILL, J., dissents with an opinion.

FRENCH, J., dissenting.

{¶ 58} The majority’s decision to deny Romell Broom an evidentiary hearing on his Eighth Amendment claim is wrong on the law, wrong on the facts, and inconsistent in its reasoning. The majority adopts the trial court’s conclusion that an evidentiary hearing is unnecessary because “[t]here is no dispute as to any operative fact in connection with the events of September 14 and 15, 2009.” Majority opinion at ¶ 31. And then, with no apparent awareness of the contradiction, the majority rejects Broom’s request for a hearing precisely because it finds an unresolved dispute of fact at the heart of the case, namely, the reason for the state’s inability to establish IV access at the start of Broom’s attempted execution.

{¶ 59} The court today holds that Broom is not entitled to an evidentiary hearing to prove his Eighth Amendment claim because he failed to prove his claim at the pleading stage; that is not the correct legal standard under R.C. 2953.21(E). The court then compounds its error by seeking evidence outside the record to prove that the state has cured the problems in its execution procedures and seizing on an execution protocol that is no longer in effect.

{¶ 60} For these reasons, I dissent.

LEGAL FRAMEWORK

{¶ 61} A method of execution violates the Eighth Amendment if it presents a risk that is sure or very likely to cause serious illness and needless suffering and give rise to sufficiently imminent dangers. *Glossip v. Gross*, ___ U.S. ___, 135 S.Ct. 2726, 2737, 192 L.Ed.2d 761 (2015). “[T]here must be a ‘substantial risk of serious harm,’ an ‘objectively intolerable risk of harm’ that prevents prison officials

from pleading that they were ‘subjectively blameless for purposes of the Eighth Amendment.’ ” *Baze v. Rees*, 553 U.S. 35, 50, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) (plurality opinion), quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846, 114 S.Ct. 1970, 128 L.Ed.2d 811 (1994), and fn. 9. The controlling opinion in *Baze* recognized that a series of abortive execution attempts might demonstrate an objectively intolerable risk of harm. *Id.*

{¶ 62} The majority opinion offers two reasons why Broom supposedly failed to satisfy the *Glossip/Baze* formula; both are unpersuasive.

1. *Broom’s evidence of a risk of serious harm*

{¶ 63} After reviewing the evidence from Broom’s postconviction petition, the court opines that it is “unclear from the record why Broom’s execution team was unable to establish IV access.” Majority opinion at ¶ 47. The logic appears to be that if he cannot prove why the errors occurred, then he cannot prove that they will recur.

{¶ 64} The court’s reasoning rests on a misapplication of a petitioner’s burden of proof when filing a postconviction petition. Before granting a hearing on a petition, a trial court must consider whether it presents “substantive grounds for relief.” R.C. 2953.21(C). A trial court acts within its discretion when it dismisses a petition without a hearing if the evidence and affidavits submitted by the petitioner fail to set forth “ ‘sufficient operative facts to establish substantive grounds for relief.’ ” *State v. Gondor*, 112 Ohio St.3d 377, 2006-Ohio-6679, 860 N.E.2d 77, ¶ 51, quoting *State v. Calhoun*, 86 Ohio St.3d 279, 714 N.E.2d 905 (1999), paragraph two of the syllabus.

{¶ 65} The requirement that a petitioner present “sufficient operative facts” in order to secure an evidentiary hearing does not mean that the facts presented must be undisputed. The court’s application of R.C. 2953.21(C) effectively eliminates the possibility of an evidentiary hearing in every case: either the petition fails to establish substantive grounds for relief, in which case the petitioner is not

entitled to a hearing, or the evidence and affidavits establish grounds for relief beyond dispute, in which case an evidentiary hearing would be superfluous.

{¶ 66} When considered in its totality, Broom's petition contained sufficient operative facts to warrant a hearing. The evidence in the record, if believed, would establish that the state has repeatedly and predictably had problems establishing and maintaining access to inmates' veins, that these problems are the result of medical incompetence on the part of the execution team members responsible for inserting IV catheters, and that the incompetence of the execution staff makes it more than likely that these problems will recur in future executions.

{¶ 67} As the majority correctly notes, the execution team unsuccessfully inserted IV catheter needles into at least 18 separate injection sites on Broom's body, and the actual number of catheter insertions was much greater than the number of needle marks because injection sites were used multiple times. But the majority gives scant attention to the testimony of Dr. Heath concerning the magnitude of medical incompetence displayed or to evidence of the state's long, problematic history with IV catheters in lethal-injection procedures.

{¶ 68} As Dr. Heath explained, execution drugs are administered through a peripheral IV catheter, which consists of a hollow needle surrounded by a plastic tube called the catheter. The practitioner inserts both the needle and the catheter into the vein. Thus, although blood draws and IV catheters both involve needle pricks, the latter also includes the insertion of an object with a wider diameter.

{¶ 69} Dr. Heath testified that in Broom's case, the medical team inserted the catheters improperly and in a fashion likely to cause greater pain:

And what [Broom] described did not sound right to me at all in terms of proper procedure. He described the depth into his muscle which they were pushing the catheter, going all the way up to the hub of the catheter, which is well over an inch deep, and going in at a very

steep angle, which does not comport with proper technique or what's going to be a successful technique for getting a catheter into a vein.

Q: And what kind of—what kind of response would a human body have to that kind of technique?

A: It would hurt.

The fact that the medical team attempted to insert the catheter into Broom's arm in a nearly perpendicular line "bespeaks of bizarre and certainly poor technique" that had "no possibility of achieving insertion." Even the Lucasville physician inserted the catheter into Broom's ankle at the wrong angle, which is why she struck bone.

{¶ 70} On two occasions, after getting the catheter into Broom's veins, team members "botched up that relatively simple process of attaching the I.V. tubing into the hub of the catheter, and blood sprayed everywhere." Compounding the problem, the team member who inserted the catheter was not wearing gloves during the procedure, thereby increasing the risk of unsuccessfully attaching the tubing.

{¶ 71} Dr. Heath testified that clinical competence demands that attempts at peripheral IV access be abandoned long before the 19th attempt. The Lucasville physician agreed with this assessment, testifying that if she had known that 18 attempts had already been made on Broom, she never would have stuck him with a needle. And although it can be proper practice to "fish" a vein—partially withdrawing a catheter, then reinserting it at a different angle—it was "completely unacceptable [and] far beyond any acceptable standard" to have made as many insertion attempts through the same needle holes as the medical team apparently did.

{¶ 72} The Broom execution attempt was not the first time the medical execution team had difficulty inserting an IV catheter. During Ohio's very first lethal injection, that of Wilford Berry in 1999, the medical team members

responsible for the IV catheter line were unable to locate a vein in Berry’s arm and had to call a third team member for assistance. When the state executed Christopher Newton in 2007, the medical team needed approximately 90 minutes to establish two IV lines. And during the 2009 execution of Marvallous Keene, the team had to switch to a backup line because they could not get fluid to flow.

{¶ 73} But the most disastrous execution prior to the attempted execution of Broom was that of Joseph Clark on May 2, 2006. Based on the end-of-the-day needle count in Clark’s case, the execution team used 17 or 18 needles trying to establish two IV lines and never did manage to install the backup line before ultimately executing him. As in Broom’s case, Dr. Heath was critical of the decision in Clark’s case to continue fruitlessly trying to establish the IV, testifying that he would not subject a patient to more than six to ten attempts, because “any normal practitioner” will recognize by that point that the effort is futile and is only inflicting needless pain on the patient.

{¶ 74} Dr. Heath offered a simple explanation for the state’s failures: incompetence. “[I]t is my opinion that the veins on Mr. Broom’s arms, other areas of his body, should be easily accessible by a competent team.” Part of the problem, he opined, arose from the fact that Ohio had lax standards regarding who may install a peripheral IV catheter during an execution. The person inserting the peripheral IV catheter should be someone who performs that task as part of his or her daily job duties. But Ohio’s protocol required only one year of experience, with no limitation on how remote in time that experience might be.

{¶ 75} Team Member 9, who participated in the Broom procedure, is a phlebotomist. But drawing blood, which is what phlebotomists do, is a “much easier and simpler” process that is “far less fraught with problems” than inserting a catheter in order to inject drugs into the body. Dr. Heath testified that allowing a phlebotomist such as Member 9 to handle the insertion at an execution is “deeply

inappropriate and reflects a deep misunderstanding and deep inability of what is needed to assemble an appropriate [execution] team.”

{¶ 76} Nor was severe pain from inserting the IV catheter the only potential harm Dr. Heath identified. During the execution of Joseph Clark, a process known as infiltration occurred. “Infiltration” means the catheter needle is no longer in the vein, and the drug is being administered into tissue surrounding the vein. Infiltration of sodium thiopental may cause “very significant pain,” either due to a pH imbalance or from the sudden accumulation of fluid in the tissue.

{¶ 77} The protocol in effect at the time of Broom’s attempted execution called for administration of sodium thiopental as the first of three drugs. The current protocol, effective June 29, 2015, permits the use of sodium thiopental at the discretion of the warden. Ohio Department of Rehabilitation and Correction, *Policy No. 01-COM-11*, at 15, http://www.drc.ohio.gov/web/drc_policies/documents/01-COM-11.pdf (“Current Protocol”) (accessed Feb. 29, 2016). But there is no evidence in the record to indicate whether infiltration is a sign of negligence or merely an unavoidable risk, even if performed by the most skilled practitioners.

{¶ 78} In the face of this evidence, it is disingenuous to dismiss Broom’s petition on the grounds that it is “unclear” why the execution team was unable to establish IV access. The majority opinion cites no evidence in the record for an alternative explanation of the state’s failure, nor could it, given that the state failed to submit any evidence. And if the majority truly believes that the cause is unclear, that is all the more reason to have an evidentiary hearing to resolve the question.

{¶ 79} Nor does the majority explain its conclusory assertion that Broom failed to establish a likelihood that he will suffer severe pain in the future. There is no evidence in the record to suggest that the state has improved the training of its execution team members or increased the certification requirements to perform these tasks. In fact, Ohio’s current execution protocol still requires only one year

of experience.³ If the state cannot explain why the Broom execution went wrong, then the state cannot guarantee that the outcome will be different next time.

2. *Ohio’s current execution protocol*

{¶ 80} In an attempt to bolster its conclusion, the majority reaches outside the record for evidence that the state has improved its execution procedures. Specifically, it cites the Sixth Circuit’s decision in *Cooley v. Strickland*, 589 F.3d 210 (6th Cir.2009), for the proposition that Ohio’s current execution protocol passes constitutional muster. Therefore, the majority asserts, “we cannot assume that the same problems with IV access will befall Broom again.” Majority opinion at ¶ 48. This argument misunderstands *Cooley* and improperly shifts the burden of proof.

{¶ 81} As explained in *Cooley*, in the aftermath of Broom’s attempted execution, the state made two changes to its execution protocol. First, it switched from a three-drug protocol to a one-drug protocol. *Id.* at 215. But since the one drug was still administered intravenously, *id.* at 219, this change did nothing to remedy the problem of incompetent insertion of IV catheters.

{¶ 82} Second, the new protocol authorized a two-drug, intramuscular injection as a backup procedure if the execution team cannot obtain IV access. Specifically, if the warden and director determine that IV injections cannot or should not be used, then the state may administer an injection of midazolam and hydromorphone intramuscularly. *Id.* at 220. But in January 2015, five years after *Cooley*, the state removed midazolam and hydromorphone from its execution

³ See Current Protocol at 2.

protocol.⁴ And that leaves the state back where it began, with a protocol that mandates intravenous injection and provides no intramuscular backup.⁵

{¶ 83} The majority opinion notes that the amended protocol added “a new command structure and forms that were required to be filled out as each step of the protocol was completed.” Majority opinion at ¶ 51. It cites *In re Ohio Execution Protocol Litigation (Wiles)*, 868 F.Supp.2d 625 (S.D. Ohio 2012), for the proposition that the state “sufficiently demonstrated a commitment to follow the protocol” to persuade the federal court to allow executions to proceed. Majority opinion at ¶ 51. And it concludes by announcing that this court is “not convinced * * * that Broom has established that the state is likely to violate its execution protocol in the future.” *Id.* at ¶ 49. The majority’s reasoning is faulty for three reasons.

{¶ 84} First, the majority opinion does not explain how the new command structure in the amended protocol will remedy the problem of medical incompetence identified in Broom’s petition. Additional paperwork will not improve the execution team’s ability to insert an IV catheter.

{¶ 85} Second, *Wiles* addressed whether the state was violating the Equal Protection Clause in its administration of its lethal-injection protocol, not the Eighth Amendment. 868 F.Supp.2d at 636-637. The district court observed “a consistent pattern of arbitrary deviations from the protocol.” *Id.* at 640. In the context of an Equal Protection claim, the state’s assurances that it would strictly comply with written procedures in the future was relevant. But *Wiles* is irrelevant to Broom’s claim under the Eighth Amendment.

{¶ 86} Third, the majority’s assertion that Broom failed to prove that the state will deviate in the future is deeply unfair. Assuming that the written protocol

⁴ Ohio Department of Rehabilitation and Correction, *Ohio Revises Lethal Injection Protocol*, <http://www.drc.ohio.gov/Public/press/press436.htm> (accessed Feb. 29, 2016).

⁵ See Current Protocol at 15-16.

is even relevant (which it is not), the state’s assurance of future compliance is in essence an affirmative defense. The majority is effectively shifting the burden of proof by faulting Broom for not rebutting evidence that the state did not even introduce into the record. And when exactly was Broom supposed to introduce such evidence? All the evidence in the record comes from the postconviction petition filed September 15, 2010. The majority relies on subsequent events and documents not contained in the record. If the majority truly believes that recent events are relevant to adjudicating Broom’s petition, the answer is to remand the petition for an evidentiary hearing, not for this court to make its own assessment without a record or input from the parties.

CONCLUSION

{¶ 87} We should remand Broom’s case to the trial court for an evidentiary hearing. With this disposition, it is unnecessary and premature for the court to address any other legal questions. I dissent.

PFEIFER, J., concurs in the foregoing opinion.

O’NEILL, J., dissenting.

{¶ 88} Respectfully, I must dissent.

{¶ 89} Shortly after I joined this court in 2013, we granted a motion to set an execution date for Jeffrey A. Wogenstahl. *State v. Wogenstahl*, 134 Ohio St.3d 1437, 2013-Ohio-164, 981 N.E.2d 900. I dissented from the scheduling order on the theory that capital punishment violates the Eighth Amendment to the U.S. Constitution and Article I, Section 9 of the Ohio Constitution. *Id.* at ¶ 2. Appellant Romell Broom’s first execution date—a botched attempt—was the example I offered to support my belief that even lethal injection is a cruel punishment on par with the “decapitations, hangings, and brandings” that were common in a less civilized time. *Id.* at ¶ 3-6.

{¶ 90} We have now come full circle. Broom is here once again on review of a successive petition for postconviction relief arguing, among other things, that a second execution attempt would constitute cruel and unusual punishment. Clearly, it would.

{¶ 91} The majority’s description of the state’s first attempt to put Broom to death chills me to the core. It is not only the rights of the defendant that are in play here. There are state employees who have tragically endured the personal trauma of unsuccessfully attempting to execute a fellow human being. And now we, as a society, are telling them, “Do it again.” I can only imagine the apprehension Broom and his executioners must be feeling now as they prepare for and await a second attempt.

{¶ 92} Once again, this case demonstrates that the term “lethal injection” is merely a convenient euphemism used to aid in turning a blind eye to the real possibility that execution procedures can and do go wrong with predictable and horrendous results. The phrase itself implies a sanitized death unlike the stories told in the media about Broom, Dennis McGuire, Charles Warner, Clayton Lockett, and others.⁶ The record is clear that Broom was poked repeatedly with a needle

⁶ The Christian Science Monitor reported in 2010 that “Broom was stuck with needles at least 18 times over the course of two hours” and that “[t]hat incident followed two others in Ohio during the past three years, both of which involved difficulties inserting the IV.” Guarino, *Ohio Execution Set in Case that Changed Lethal Injection Process*, Christian Science Monitor (Mar. 16, 2010), <http://www.csmonitor.com/USA/Justice/2010/0316/Ohio-execution-set-in-case-that-changed-lethal-injection-process> (accessed Mar. 1, 2016). Ohio inmate Dennis McGuire “experienced ‘true pain and suffering’ ” during his successful execution as he “gasped, choked, clenched his fists and appeared to struggle against his restraints for about 10 minutes * * * before being pronounced dead.” Johnson, *Dennis McGuire’s Execution Was Not ‘Humane,’ Doctor Says*, Columbus Dispatch (Aug. 13, 2014), <http://www.dispatch.com/content/stories/local/2014/08/12/inmate-suffered-pain-during-execution-doctor-says.html> (accessed Mar. 1, 2016), quoting a California anesthesiologist’s sworn statement from a civil suit filed by McGuire’s children. In Oklahoma, Charles Warner suffered five attempts at IV insertion and then exclaimed, “My body is on fire,” after executioners injected him with the wrong drug. Gajanan, *Oklahoma Used Wrong Drug in Charles Warner’s Execution, Autopsy Report Says*, The Guardian (Oct. 8, 2015), <http://www.theguardian.com/us-news/2015/oct/08/oklahoma-wrong-drug-execution-charles-warner> (accessed Mar. 1, 2016).

and that pain was unquestionably inflicted, not unlike procedures that have been recognized as torture in the past. *See Wilkerson v. Utah*, 99 U.S. 130, 135, 25 L.Ed. 345 (1878) (public dissection is torture); *Baze v. Rees*, 553 U.S. 35, 94-99, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008) (Thomas, J., concurring) (dismemberment, cutting off hands or ears, and slitting nostrils are torture). Any fair reading of the record of the first execution attempt shows that Broom was actually tortured the first time. Now we embark on the task of doing it again.

{¶ 93} Today we have the rare opportunity to address not just the cruelty inherent in putting someone to death once—this case is about the second try. Incredibly, the majority cites the case of Willie Francis as support for its determination that the state does not violate the Eighth Amendment by undertaking a second execution attempt. Majority opinion at ¶ 23. Francis may be the only other individual in the recent history of our nation who survived a first attempt at imposing the death penalty only to be successfully executed on the second attempt. I absolutely reject using the Francis case in defense of our tortured American history involving the death penalty. His very conviction is a look into the true tragedy of all executions in America. For let us not forget—ignoring the present case for the moment—that our national record is replete with examples of innocent people being executed. The Willie Francis case, tragically relied upon by the majority for the proposition that a second execution attempt is not on its face

Clayton Lockett also suffered more than a dozen painful attempts at IV insertion. Stern, *The Cruel and Unusual Execution of Clayton Lockett*, *The Atlantic* (June 2015), <http://www.theatlantic.com/magazine/archive/2015/06/execution-clayton-lockett/392069/> (accessed Mar. 1, 2016). The drugs ultimately were administered to Lockett through an IV that had dislodged from his vein. Consequently, the drugs pooled under his skin and entered his bloodstream more slowly, and he received only a partial dose of the sedative midazolam before he died. In the meantime, Lockett was able to wake up, struggle with his restraints strongly enough to cause “blunt-impact injuries” to himself, and managed to say the word “Man” among other, incoherent mumbling. *Id.* Lockett died “slowly and in apparent agony” while the medical team attempted to reinsert his IV. *Id.*

constitutionally defective, magnifies the problems of cruelty and racial injustice in one package and offers at once an instructive example of both the progress and regression of our justice system.

{¶ 94} If Willie Francis had been tried for his alleged crime today, he would not have been sent to the electric chair the first time. Francis was a 17-year-old black male in Louisiana on May 3, 1946, the first time the state attempted to put him to death. Miller & Bowman, *Death by Installments: The Ordeal of Willie Francis* 1, 20 (1988). He had been convicted by an all-white, all-male jury. *Id.* at 24. Six days after being appointed, his attorneys put up no defense despite a glaring lack of evidence. *Id.* at 23-26. Let me repeat that—this black teenager’s court-appointed attorneys offered no defense in a death-penalty case in the Deep South just after World War II. The state of Louisiana used two probably coerced confessions that were inconsistent with forensic evidence and the story of the only eyewitness to the murder. *Id.* at 23-26. He received a mandatory death sentence and was not informed of his rights to appeal or to appointed counsel for that purpose. *Id.* at 26-27. There was no appeal of his conviction or sentence. *Id.* And this is the case the majority relies upon to suggest that due process is alive and well in Ohio.

{¶ 95} Since Francis was convicted and executed, our ideas of the Constitution have evolved substantially. Courts now recognize that it is a cruel and unusual punishment to execute a minor. *Roper v. Simmons*, 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). The right to a jury trial has evolved such that under current law, Francis could have challenged the selection of his all-white, all-male jury as well as the makeup of the pool from which the jurors were selected. *See Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975); *Alexander v. Louisiana*, 405 U.S. 625, 92 S.Ct. 1221, 31 L.Ed.2d 536 (1972). The right to counsel has evolved to the point where Francis’s conviction would have been

overturned as a result of counsel’s objectively unreasonable choice not to defend, and he would have had appellate counsel to argue that issue for him. *See Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); *Douglas v. California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). Mandatory death sentences, like the one Francis was given, are now unconstitutional. *Sumner v. Shuman*, 483 U.S. 66, 107 S.Ct. 2716, 97 L.Ed.2d 56 (1987). In all of these ways, our conception of the United States Constitution has evolved. I wonder when concepts of human dignity will evolve sufficiently that the state of Ohio will lay down the death penalty entirely just like the more obvious forms of torture that have been abandoned so far. *See, e.g., Kennedy v. Louisiana*, 554 U.S. 407, 419, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008) (“The [Eighth] Amendment ‘draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society’ ” (quoting *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 2 L.Ed.2d 630 (1958))). This is because “[t]he standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change.” *Furman v. Georgia*, 408 U.S. 238, 382, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (Burger, C. J., dissenting).

{¶ 96} On the precise question before this court—whether a second execution attempt violates the Eighth Amendment—the United States Supreme Court issued a fractured judgment resting entirely on a discredited theory of our Constitution. Francis was put to death with four justices agreeing with his Eighth Amendment argument, four disagreeing, and one justice believing that the Eighth Amendment did not apply to the states through the Fourteenth Amendment. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 472, 67 S.Ct. 374, 91 L.Ed. 422 (1947) (Burton, J., joined by Douglas, Murphy, and Rutledge, JJ., dissenting); *id.* at 464 (lead opinion); *id.* at 469-470 (Frankfurter J., concurring). Our jurisprudence has evolved on this point as well, and the Eighth Amendment was

formally incorporated in the Fourteenth Amendment as a limitation upon the power of the states. *Robinson v. California*, 370 U.S. 660, 82 S.Ct. 1417, 8 L.Ed.2d 758 (1962).

{¶ 97} Despite the quirk of constitutional theory that the judgment of the *Francis* court rests on, five of the justices were able to recognize the second execution attempt for what it was: torture. *Resweber* at 471 (Frankfurter J., concurring) (“Strongly drawn as I am to some of the sentiments expressed by my brother Burton, * * * were I to [join the dissenting opinion,] I would be enforcing my private view rather than that consensus of society’s opinion which, for purposes of due process, is the standard enjoined by the Constitution”); *id.* at 476-477 (Burton J., dissenting) (“[T]oday, two separated applications [of electricity] are sufficiently ‘cruel and unusual’ to be prohibited”); *Miller & Bowman* at 125-127 and fn. 18 (the Willie Francis case weighed “ ‘so heavily on [Justice Frankfurter’s] conscience’ ” that he convinced a former Harvard law school classmate, a leading member of the Louisiana bar, to seek clemency on Francis’s behalf), quoting Justice Burton’s papers, box 171, available in Library of Congress. In this way, we have regressed.

{¶ 98} I believe as a moral and constitutional matter that subjecting Broom to a second execution attempt after even one extremely painful and unsuccessful attempt is precisely the sort of “lingering death” that the United States Supreme Court recognized as cruel within the meaning of the Eighth Amendment 125 years ago. *In re Kemmler*, 136 U.S. 436, 447, 10 S.Ct. 930, 34 L.Ed. 519 (1890). For that reason, I would reverse the judgment of the court of appeals.

{¶ 99} Consequently, I dissent.

Timothy J. McGinty, Cuyahoga County Prosecuting Attorney, and Christopher Schroeder, Matthew Meyer, Katherine Mullin and T. Allan Regas, Assistant Prosecuting Attorneys, for appellee.

SUPREME COURT OF OHIO

S. Adele Shank and Timothy F. Sweeney, for appellant.

Timothy Young, Ohio Public Defender, and Rachel Troutman, Assistant
Public Defender, urging reversal for amicus curiae, Ohio Public Defender.

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

ORIGINAL

Scott S. Harris
Clerk of the Court
(202) 479-3011

December 12, 2016

Clerk
Supreme Court of Ohio
65 South Front Street
Columbus, OH 43215-3431

Re: Romell Broom
v. Ohio
No. 16-5580
(Your No. 2012-0852)

Dear Clerk:

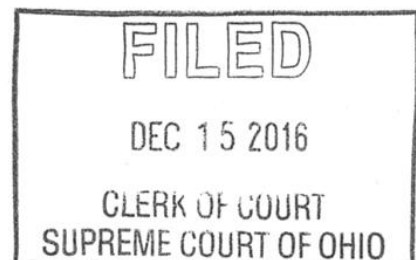
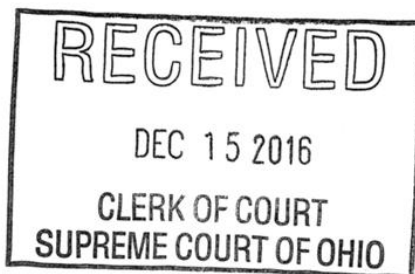
The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied. Justice Breyer and Justice Kagan would grant the petition for a writ of certiorari.

Sincerely,



Scott S. Harris, Clerk



Appendix F

APPX 0127

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

ORIGINAL

Scott S. Harris
Clerk of the Court
(202) 479-3011

February 21, 2017

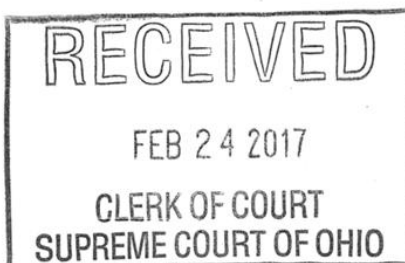
Clerk
Supreme Court of Ohio
65 South Front Street
Columbus, OH 43215-3431

Re: Romell Broom
v. Ohio
No. 16-5580
(Your No. 2012-0852)

Dear Clerk:

The Court today entered the following order in the above-entitled case:

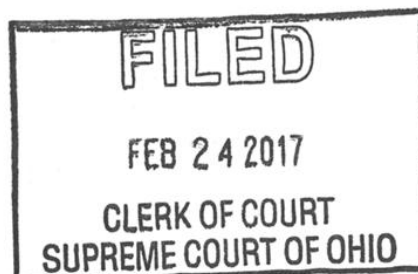
The petition for rehearing is denied.



Sincerely,

A handwritten signature in cursive script that reads "Scott S. Harris".

Scott S. Harris, Clerk



Appendix G

APPX 0128

28 USCS § 2254, Part 1 of 5

Current through Public Law 116-193, approved October 30, 2020.

United States Code Service > **TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE (§§ 1 — 5001)** > *Part VI. Particular Proceedings (Chs. 151 — 190)* > **CHAPTER 153. Habeas Corpus (§§ 2241 — 2256)**

§ 2254. State custody; remedies in Federal courts

(a)The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)

(1)An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that—

(A)the applicant has exhausted the remedies available in the courts of the State; or

(B)

(i)there is an absence of available State corrective process; or

(ii)circumstances exist that render such process ineffective to protect the rights of the applicant.

(2)An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3)A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c)An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d)An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—

(1)resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2)resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)

- (1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.
- (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
- (A) the claim relies on—
 - (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
 - (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
 - (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
- (f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.
- (g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.
- (h) Except as provided in section 408 of the Controlled Substance Acts [21 USCS § 848], in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.
- (i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254 [28 USCS § 2254].

History

HISTORY:

Act June 25, 1948, ch 646, 62 Stat. 967; Nov. 2, 1966, P. L. 89-711, § 2, 80 Stat. 1105; April 24, 1996, P. L. 104-132, Title I, § 104, 110 Stat. 1218.

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